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IN THE

Supreme Court of the United States

KENNETH CUADRA,

Petitioner,

v.

HOUSTON INDEPENDENT SCHOOL DISTRICT; CAROL WICHMANN; MARMION DAMBRINO; BILLY ALDRICH; BETH BONNETTE; MELBA MARTIN; ANNE PATTERSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Petitioner asserted a claim for malicious prosecution grounded in a specific federal right guaranteed by the Constitution of the United States.

2. Whether Petitioner raised a genuine issue of material fact on elements of the Texas common law claim for malicious prosecution.

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The opinion of the United States Court of Appeals for the Fifth Circuit filed November 17, 2010 is set forth as Appendix A. The unpublished opinion of the United States District Court for the Southern District of Texas, Houston Division, dated September 11, 2009 is set forth as Appendix B.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit denied a timely filed Petition for Rehearing En Banc on January 19, 2011. (App. D.) The Supreme Court of the United States has jurisdiction pursuant to Title 28 U.S.C., section 1254 (1).

STATEMENT OF THE CASE

This is a Petition for Certiorari from the decision of the United States Court of Appeals for the Fifth Circuit affirming the trial court's order granting Respondents' Motion for Summary Judgment, Fed. R. Civ. P. 56. Petitioner, Kenneth Cuadra ("Petitioner" or "Cuadra"), alleges a Title 42 USC Section 1983 action against the Respondents in this matter for his seizure by arrest and indictment in 2005 and re-indictment and re-arrest in 2006, after he and a co-worker, Kathleen Henry-Love ("Henry"), at Respondent Houston Independent School District's ("HISD") Sharpstown High School ("SHS") appeared in investigatory television interviews in February 2003 regarding claims that HISD administrators had falsely reported student dropout numbers at SHS to the Texas Education Agency ("TEA") in the annual reporting of

student data for the re-enrollment of 2001-2002 students. The indictment against Petitioner was dismissed by the Harris County District Attorney on November 1, 2006. Petitioner filed this suit against Respondents, Dave Vollmer, and Rusty Hardin and Associates, P.C. ("Hardin"), on October 7, 2007. Petitioner voluntarily dismissed his action against Vollmer. After responses to Petitioner's written discovery were made by Hardin, and the depositions of Rusty Hardin and Andrew Drumheller (a Hardin shareholder) had been taken, Petitioner learned that HISD had not provided a certain document (denominated the "Smoking Gun") to Hardin, and Petitioner dismissed his claims against Hardin. Respondents, having filed motions to dismiss which had been denied, jointly filed a Motion for Summary Judgment. The District Court referred the matter to United States Magistrate Judge John Froeschner, who recommended that Respondents' Motion for Summary Judgment be granted. (App. C.) The District Judge adopted the magistrate's recommendation and entered judgment against Petitioner on September 11, 2009 (App. B), from which an appeal was taken to the United States Court of Appeals. The Court of Appeals affirmed the trial court on November 17, 2010. (App. A.) Petitioner then timely filed a Petition for Rehearing En Banc on January 4, 2011, which was denied on January 19, 2011. (App. D.) Consequently, Petitioner files this Petition for Certiorari.

STATEMENT OF FACTS

As a member of the Fifth Circuit's panel commented during recorded argument, "If [Cuadra]'s right about what [Respondents] did, it is not a pretty sight." Unfortunately, what Cuadra has said is true.

Contrary to suggestions by the Fifth Circuit, this is not a case about nor has Cuadra asserted "a free standing Section 1983 malicious prosecution claim" (App. A, pg. 4a). While it was observed that the manufacturing of false evidence and withholding "exculpatory evidence" to influence a criminal prosecution are merely part of "a free standing malicious prosecution claim" or common law tort, Cuadra contends that in this case where the District Attorney dismissed an indictment with an accompanying Press Statement, after receiving exculpatory evidence from Cuadra's defense lawyer, which Respondents withheld, implicates a federal right.

This is a case where an innocent person was indicted, not merely in the absence of probable cause, but because evidence was fabricated to inculpate him, and exculpatory evidence was kept from the District Attorney and two grand juries, which fabrication and deprivation influenced and/or tainted the process to produce two indictments of Petitioner Cuadra. This is also a case about the retaliation against Cuadra with a tainted criminal prosecution because he went to the media and aided in the revelation of the false reporting of dropouts in HISD. Neither of those claims were time-barred. The facts span four years.

Cuadra served as a network specialist at SHS, immediately supervised by SHS Business Manager

Col. Robert Kimball, USA (Ret'd), Ed.D. ("Kimball"), until February 19, 2003, when he was transferred to HISD's West District Office by Respondent West District Superintendent Anne Patterson ("Patterson") and Respondent SHS Principal Carol Wichmann ("Wichmann"), and targeted, by the decision of both, in an investigation by Respondent Billy Aldrich ("Aldrich"). Before his sudden transfer, Cuadra played a role in SHS' required annual reporting of student dropout data to HISD's Federal and State Compliance office ("FSC") and the TEA.

The investigation and Cuadra's transfer were triggered by a media investigation, conducted by KHOU Channel 11, a Houston television station and CBS affiliate ("Channel 11").

On February 6, 2003, Channel 11 commenced a series of reports (at least ten), spanning five months, and focusing on SHS' and HISD's *official* reports to TEA underreporting SHS' student dropouts. The series began with an on-camera interview on February 6, 2003 by investigative reporter Anna Werner with Wichmann, observed by Patterson. Werner's interview with Wichmann was broadcast in segments on February 10, 11, and 13, 2003. It was described by Patterson as "awful."[1]

On February 7, 2003, the day after Werner's interview of Wichmann, Patterson wrote the Director of HISD's

1. Citations to the Clerk's Record prepared by the District Court and provided to the Fifth Circuit, and to deposition testimony, have not been included, but will be furnished on request or in response to objection.

Department of Professional Standards ("DPS") and asked that an investigation be initiated, focused on Kimball, Cuadra, and Henry (Kimball's clerk). According to Wichmann, both she and Patterson decided to initiate the investigation, and Patterson wrote the February 7, 2003 email to DPS. In her email, Patterson asked that DPS assign "Mike M." as the investigator to "intimidate" Kimball and cause Cuadra and Henry to "fold." "Mike M." was unavailable, and Aldrich, who was "just as good [as 'Mike M.']," was assigned. Patterson identified the purpose of the investigation as discovering who leaked to Werner a document listing thirty (30) dropouts, when Wichmann, in reporting to FSC and TEA, had reported on December 6, 2002 and certified by her signature on January 27, 2003 that SHS had zero (0) dropouts. As a result of Channel 11's revelations (including the airing of an interview with Cuadra on February 26, 2003) exposing SHS' dropout fraud, the TEA embarked on an investigation of HISD in Spring of 2003; issued a report condemning HISD's false reporting of student dropouts; lowered State accountability ratings of various HISD schools, specifically lowering SHS to "Unacceptable"; there was negative national and local media directed at HISD; and caused loss or risk of loss of financial benefits from the "Campus Incentive Pay Program."

In suggesting to DPS motives for leaking information by Cuadra, Henry, and Kimball, Patterson falsely portrayed Cuadra and Henry as being on the brink of imminent termination (suggesting that they were disgruntled employees), and additionally identified Cuadra as having viewed Carlton Tucker, a former administrator adversary of Wichmann's, as a "father." Patterson described Kimball as a person who previously

had reported claimed misdeeds of other administrator(s). Patterson also alerted the DPS director to the potential for a "whistle blower" claim.

Wichmann and Respondent Associate Principal Marmion Dambrino ("Dambrino") had decided to transfer Kimball and Cuadra from SHS at least as early as February 15, 2003, when Wichmann and Dambrino told SHS Assistant Principal Andrew Monzon ("Monzon") that both were to be transferred or reassigned away from SHS.

A pretextual opportunity to transfer Cuadra was found on February 18, 2003. Wichmann received an open record request from Channel 11 for all emails related to the dropout issue. Wichmann met with Dambrino, Respondent Principal Intern Merrie Beth Bonnette ("Bonnette"), and Assistant Principal Jane Lozano ("Lozano") and conducted an after-hours "search" of Cuadra's office. In the "search," Lozano found a file labeled "Dropouts" in Cuadra's desk.[2] One of the runs was from October 22, 2002, 8:07 p.m., listing 30 students' names, with 29 marks on the right side of the column and 10 on the left, and the word "Done" written in brown marker, along with three numbers (to wit: 73, 74, and 21). Wichmann telephoned Patterson and reported Lozano's find. The following day, February 19, 2003, Aldrich came unannounced to SHS to surprise Cuadra, and interrogated him. Aldrich interviewed Cuadra on three occasions, at least two of which Aldrich

2. PEIMS was the TEA's database into which student data was uploaded from the local HISD SASI program by Cuadra. Cuadra would accomplish the uploading function at an appropriate and agreed time by locking out all other accessors at SHS and upload to TEA via a program called "Edit+ [Plus]." He would then usually make print-outs ("runs") of the new version of the data.

tape recorded. The Fifth Circuit stated, "During the course of his investigation, Aldrich spoke to HISD and SHS employees and interviewed Cuadra twice [sic]. In both interviews with Aldrich, Cuadra did not disclose that anyone asked him to change the dropout data." (App. A, pg. 4a.) Wichmann delivered a prepared letter to Cuadra which stated in part, "I have been informed that you are accused of altering student records without authorization. In light of the serious nature of the allegations, I believe it is in your best interest and that of the school district that you be relieved of your duties . . . until a thorough investigation can be completed and a decision reached as to how the matter will be resolved. . . . [Signed] Dr. Carol Wichmann On behalf of the West District Office and Anne Patterson, District Superintendent."

On February 20, 2003, Kimball met with Aldrich and gave him a memo and supporting exhibits. Amongst the documents provided to Aldrich by Kimball was a copy of the "Smoking Gun."[3] Kimball's memo to Aldrich stated,

> In early [sic] October, Kenneth Cuadra was off campus for training. He returned one evening after the training session and briefly informed me that he was called by Ms. Dambrino and told he had to clean up some reports because Dr. Wichmann had to meet with the Superintendent the next day. I advised Mr. Cuadra not to falsify

3. The "Smoking Gun" is a portrait-printed dropout roster of 30 students' names alongside six (6) columns of data containing Respondent Martin's and Respondent Dambrino's handwriting. It has alternatively been referred to throughout this lawsuit as, "the Smoking Gun," "Melba's List," "SRS 1028," and/or some variation of the phrase, "the portrait print dropout roster."

> any data because it would constitute fraud and that if he was being told to do so and did it he would be just as guilty as Ms. Dambrino and Dr. Wichmann, if they implied our suggested that he do it. The next morning Mr. Cuadra told me that he had put everything back the way it was.

On February 26, 2003, Channel 11 aired Werner's interview of Cuadra. In the broadcast portions of that interview, Cuadra related how he had been asked to delete names from the dropout list, deleted the names, and then restored them. Cuadra also told Werner how he had been instructed to sign off as responsible for the dropout reporting when he was not the person responsible, and had refused.[4]

On February 28, 2003, Kimball was stripped of his duties and reassigned to Patterson's West District Office.

Both Kimball and Cuadra filed administrative grievances because of their transfers. Kimball's eventually led to a "whistleblower" claim against HISD which

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4. After Cuadra refused to sign as responsible for the dropout report on January 27, 2003, Wichmann's secretary told Assistant Principal Monzon that Wichmann wanted him to sign as being the person responsible instead of Martin. Monzon complied. As a result of Channel 11's broadcasts of Wichmann's and SHS' false certification of zero dropouts to the TEA on January 27, 2003, TEA investigated HISD's false dropout reporting. For having complied with Wichmann's instruction to sign as being the person responsible for the zero dropout report of 2002-2003, Monzon was administratively disciplined. Monzon wrote about being duped by Wichmann into accepting responsibility for the dropout report in a published letter to the editor of the Houston Chronicle.

was administratively settled by HISD paying Kimball $100,000.00 and reinstating him to the position of Assistant Principal at another school. Cuadra's grievance was reassigned by Superintendent Stripling from Patterson to Executive Deputy Superintendent Saavedra. Cuadra was reassigned to "Transportation," lost his grievance on August 29, 2003, and was eventually indicted for a felony, "alteration of a governmental record . . . with intent to defraud," on October 7, 2005; and reindicted on May 31, 2006.

At all times material to this action, HISD, including SHS, used "a computer program known as SASI to maintain official records of student data, including student drop-out information." (App. A, pg. 2a.) HISD schools, including SHS, make official student data reports quantifying each school's dropouts for HISD's FSC and the TEA according to a district-wide calendar.

The key dates during the 2002-2003 school year ***did not include*** October 22-23, 2002 and neither were key dates for the final submission of dropout data to the TEA. The key dates were the first submission of data in the first week of December 2002, final submission on December 18, 2002, and the principal's certification on January 27, 2003. FSC's Antonia Druary ("Druary") reported to Aldrich when he interviewed her in his investigation that October 22-23, 2002 were not necessarily key dates. Yet, throughout the construction of their charges against Cuadra, Respondents falsely attributed significance to October 22 and 23, 2002 as if those two dates represented HISD's official report of dropouts to TEA. During the 2002-2003 school year, the year in question, Cuadra did not input into SASI any student dropout data except that

which he entered on October 22, 2002, at the instruction of Wichmann and Dambrino, and reversed the next day, October 23, 2002.

The Fifth Circuit recited, "Cuadra claims that, on October 22, 2002, Assistant Vice Principal [sic][5] [Dambrino] and [Wichmann] told him to randomly delete ten to fifteen names from the student drop-out list in anticipation of a meeting with General Superintendent Kaye Stripling . . . . Dambrino and Wichmann dispute Cuadra's account." (App. A, pg. 3a & n.1.)

Regarding the events of October 22, 2002, Cuadra was off-campus in a training course when he was paged from SHS at approximately 4:00-4:30 p.m. He returned the page and Kimball answered the phone. Then Cuadra spoke with Dambrino and Wichmann. Cuadra recalls that Bonnette was there and Wichmann told her to put the report in a folder on Cuadra's desk. Cuadra testified in his deposition,

> [he] was directed to make about 12 to 15 changes to a list of 30 names . . . for the principal [Wichmann], for a meeting that [Wichmann] had to attend the next day and that . . . Melba [Martin] had not done her job that day to code them and that they [Wichmann, Dambrino, Bonnette] had called [Martin] . . . [and] could not find her . . . . When [Cuadra] asked [Dambrino]

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5. Dambrino was Associate Principal not "Assistant Vice Principal." The distinction is significant because, as Associate Principal, Dambrino was of superior rank to all personnel on the SHS campus except Wichmann.

> . . . why they didn't have [Martin] do it since it was her job, [Dambrino] began yelling at [Cuadra] and telling [him] that: 'Kenny, you need to get back up here.' . . . [Cuadra] told her: 'Who do I take off the list? I don't even know what information [Martin] has got.' [Cuadra] asked [Dambrino] to give [him] the names of the kids in [Martin]'s office. [Dambrino] told [Cuadra] she didn't know where that list was, that [Martin] had it somewhere in her office and [Dambrino] didn't know where [Martin] put it. [Dambrino told Cuadra] She didn't care which names [Cuadra] took off so [long as] she knew that between 12 and 15 names came off for [Wichmann]. [Cuadra] told [Dambrino] that [he] would do what [he] was instructed to do [but that he would] put the names back [after producing a print for Wichman]. [Dambrino] said that was fine. And it was because [Martin] would know . . . not only who, but how to code them.

Cuadra returned to SHS that night of October 22, 2002, found the folder on his desk, and made the changes to 12-15 "leavers'" names as he had been directed.

Within HISD, student information data was input into a local computer program known as "SASI." The SASI program had two principal data screens for the purpose of this case. Those screens were the "Attendance Finance Information Cathode Ray Tube," or "AFI CRT" ("AFI"), and the "Miscellaneous Cathode Ray Tube," or "MIS CRT" ("MIS").

Respondent Melba Martin ("Martin"), an attendance clerk at SHS, supervised by Dambrino, was responsible for inputting leaver data into SASI, and only Cuadra could forward Martin's inputted student dropout data to HISD's FSC and TEA via Edit+. However, Cuadra did not have any knowledge of, or responsibility for, the accuracy of the data he was sending.

Martin input student leaver data into SASI on the MIS screen. Student data uploaded to TEA from HISD's AFI screen was replaced by subsequently uploaded versions of the data from HISD's MIS screen. The MIS data input would override data entries from HISD's AFI screen in TEA's PEIMS program.

The Fifth Circuit concluded, "Cuadra admitted to changing the student drop-out data on October 22nd, [2002,] which alone should suffice to establish probable cause for his indictments." (App. A, pg. 10a.) Wichmann and Dambrino, as noted by the Fifth Circuit at footnote 1, "dispute[d] Cuadra's account," but that dispute was in part. Wichmann and Dambrino agreed with Cuadra's account -- in part -- and disputed each other's versions -- in part.

The documented status of the 30 reported SHS dropouts at various times during the 2002-2003 school year through October 24, 2002, were as follow:

- 30 Dropouts as of October 3, 2002, 2:57 P.M.;
- 30 Dropouts as of October 4, 2002, at 4:24 P.M.;
- 30 Dropouts as of October 14, 2002, at 7:07 A.M.;

- 30 Dropouts as of October 18, 2002, at 7:51 A.M.;
- 30 Dropouts as of October 22, 2002, at 8:07 P.M.;
- Cuadra ONLY made alterations/data entries on October 22,-23 2002;
- 10 Dropouts as of October 23, 2002, at 9:41 A.M.;
- 0 Dropouts as of October 23, 2002, at 4:39 P.M.; and
- 30 Dropouts as of October 24, 2002, (per Dambrino's notes).

The testimony of Wichmann and Dambrino regarding the events of October 22, 2002 is conflicting. A material disparity or question exists between what Cuadra was told to do, and the versions offered by Dambrino and Wichmann. In that gap is the issue of whether Cuadra was authorized to make changes to student dropout data.

Dambrino recalled: Cuadra was at a regular Tuesday night HISD training class approved by Wichmann; she, Bonnette, and Wichmann were at SHS in the evening; Wichmann asked her to page Cuadra and tell him to return to SHS that night to make *some changes to documents which Wichmann had in a folder and needed for a meeting with Superintendent Stripling early on the following day*; she did not look into the folder; and she didn't know what changes Wichmann wanted Cuadra to make, or to which documents.

Wichmann testified: she didn't know why Cuadra was being called back to SHS on the night of October 22, 2002;

she didn't know what he was going to do; the folder she and Dambrino gave Cuadra was from Antonia Druary (with FSC); Wichmann didn't know what Cuadra would be working on; Wichmann and Dambrino both put the folder on Cuadra's desk for him to come back to in his office; she did not know what was in the folder; she never had the folder; and she never looked in the folder. The Fifth Circuit chose to believe that Cuadra was not instructed or authorized by Wichmann or Dambrino to make changes to dropout data on October 22, 2002. According to Wichmann and Dambrino, of the four (Wichmann, Dambrino, Bonnette, and Cuadra), *only Cuadra* looked in the folder and knew what changes he was to make to which documents -- for Wichmann's meeting with Stripling (per Dambrino), or for Druary (per Wichmann).

Cuadra testified that he made the authorized changes to the student dropout data on October 22, 2002 as instructed by Dambrino and Wichmann, and made restorations on October 23, 2002, in HISD's *AFI screen.* It is clearly inferable that Cuadra first discussed changing student data in the AFI screen with Aldrich on February 19, 2003. Aldrich knew of the significance of AFI after February 19, 2003, because Aldrich notes that he returned to his office and met with "Dave Vollmer/Technology [who] examined the AFI data screens . . . and was not able to identify anyone who might have changed the data." Had Aldrich not known of the AFI's significance in the data alterations, he would not have discussed AFI with Vollmer on February 19, 2003.

In pre-October 22, 2002 PEIMS Dropout Rosters, the AFI screen coded student Blanca Aguirre as "04," having withdrawn on March 26, 2002 to join the military; in other words, a dropout.

On October 23, 2002, after Cuadra made the instructed changes in the dropout codes and reversed them, Respondents claim Cuadra had transformed the 30 dropouts to 30 non-dropouts, and yet Aguirre's leaver code in AFI, in which Cuadra had made his deletions of October 22, 2002, still reflected an "04" leaver code.

Entries made in the MIS screen, the screen utilized by Martin, "trump" or override entries made in AFI when uploaded to the PEIMS database. It is undisputed that a false, final entry was made in MIS leaver data, *after October 22, 2002*, reflecting that Aguirre had withdrawn NOT to enter the military, but instead to enter "Gulf Shores," a private school (leaver code "81"), making her a non-dropout. The AFI screen, where Cuadra made his changes on the night of October 22, 2002, remains evidence that Aguirre's leaver code was the same negative leaver (dropout) code before and after Cuadra made and reversed the instructed changes. When the "81" was entered on Aguirre's MIS screen on October 23, 2002 by Martin, it didn't alter the AFI record of "04," so the evidence remains. Because of the Edit+ program design, when the information changing the status of the 30 dropouts to non-dropouts was input into SASI, it was done in MIS, otherwise AFI's "dropout" status would have been reflected after October 24, 2002, when the dropout values were uploaded to TEA's PEIMS database. MIS "trumped" AFI, and it was the MIS' contents on Aguirre, and the 30 other students, which were uploaded and recorded--changing the status of the dropouts to non-dropouts. It is, after all, undisputed that HISD's Tech Director Dave Vollmer verified to all counsel herein by e-mail, on March 9, 2009 that HISD's AFI screens still reflect the *original SHS 30 dropouts*.

The documented numerical status of the 30 reported SHS dropouts at various times *after* October 24, 2002, from November 5, 2002 through January 27, 2003, were as follow:

- 0 Dropouts as of November 5, 2002, (per Wichmann's deposition testimony);
- 30 Dropouts as of November 6, 2002;
- 0 Dropouts as of December 1, 2002, at 1:06 P.M.;
- 0 Dropouts as of December 4, 2002, at 12:19 P.M.;
- 0 Dropouts as of December 9, 2002, (per Saavedra's notes);
- 0 Dropouts as of December 18, 2002 (per emails amongst Dambrino, Wichmann, and Janet Nolte [FSC]);
- 0 Dropouts as of January 18, 2003, at 8:30 A.M.;
- 0 Dropouts as of January 19, 2003, at 10:20 P.M.; and
- 0 Dropouts as of January 27, 2003 (per Wichmann's certification to TEA).

It was the consensus among HISD's administrators that a low or zero dropout rate at SHS was implausible, especially in 2001-2002 because of SHS' student makeup:

a. Wichmann stated in an April 8, 2005 CNN Statement, "In late December [2002], I did sign

that we had 0 drop outs on our campus . . . We questioned a 0 drop out."

b. Kimball challenged the zero dropouts to Wichmann on November 5, 2002.

c. Janet Nolte, Manager, HISD's FSC, sent an email to Wichmann on December 18, 2002 challenging the zero dropout report.

d. Druary, West District FSC Officer, noted that SHS' report of a zero dropout rate in December 2002 raised flags of unreasonableness, and that other schools under Anne Patterson's supervision which had reported zero dropout had raised the same "flags."

e. Druary pointed out to Aldrich and Hardin that SHS had been "alerted . . . about making sure their zero dropouts had documentation before their resubmission to [S]tate [C]ompliance in Jan[uary 2003]. **They had plenty of time to get their information correct.**" (Emphasis added.)

f. Druary emailed Martin, copying Dambrino and Monzon, on December 5, 2002 regarding "Presumed Under-Reported Students," students whose leaver or dropout status had not yet been determined, and asked that the roster of presumed under-reported students be addressed before December 10, 2002.

g. Lozano, according to the transcript of her March 4, 2003 examination/interview by Aldrich, stated

> that **she had been told as early as late in the Spring semester of 2001-2002, there would be a zero dropout rate in the Fall Collection of the 2002-2003 school year.** Lozano also said that she knew from the SASI data that a former student of hers was a dropout (Juana Juarez) because she had withdrawn from school to care for her baby and was a dropout, and that **she not only told Dambrino and Wichmann, she had shown them the SASI screen entry made by her in the 2001-2002 school year.**

On May 15, 2003, Aldrich records that the following exchange occurred:

> Mr. Cuadra then questioned . . . if I examined Melba Martin's data . . . I replied that I did not want to try the case at this time, that all he needed to know at this point is that I have evidence that he changed the data, and that he is a liar. I told him that each time he comes up with a different story, he has some supposed evidence that will support him, but it never materializes . . . . There is no evidence to support his contention that he modified the student records and then changed them back. **I told him that the evidence supports that he changed the data, and it remained changed until the final submission in January.**

(Emphasis added.)

After Wichmann became Principal of SHS in 1999, she reported 0% dropouts for 1999-2000, 0.2% for 2000-2001, and, according to Lozano, announced the rate for 2001-

2002 was to be zero while *officially* predicting a dropout rate at SHS for the 2001-2002 school year to "be at or below 1.0%." Wichmann told Kimball, when he challenged the accuracy of the dropout numbers in November 2002, that she had been instructed by Patterson to produce zero dropouts when she was hired.

Executive Deputy Superintendent Saavedra reported in 2003,

> On or about January 27, 2003, [Wichmann] signed and submitted to the Department of State and Federal Compliance the Fall PEIMS Resubmission Approval Report. One of the data elements on the report that was approved by Dr. Wichmann was the number of dropouts. That number was reported as zero. In her testimony, Dr. Wichmann says that she first knew that Sharpstown had zero dropouts on December 9, 2002.

and

> Dr. Wichmann and Ms. Dambrino stated . . . that although they might have been concerned about the zero dropouts being reported, they **consistently checked with [Martin], . . . to ensure that the data were accurate and the appropriate documentation was on file. Dr. Wichmann and Ms. Dambrino stated that Ms. Martin on numerous occasions assured them that everything was in order.**

(Emphasis added.)

Cuadra argues Respondents *wrongfully* pinned responsibility on him, though *he is innocent*. The uncontestable evidence supports his argument, e.g.: Cuadra was *probably* told by Dambrino and Wichmann to make dropout data changes on October 22, 2002 (only his deposition testimony of the three--Wichmann, Dambrino, and Cuadra--is unambiguous and plausible); Cuadra's changes were reversed by him according to HISD's AFI screens, Dambrino's notes of October 24, 2002, and Wichmann's and Dambrino's testimony about the dropout status of 30 on Novemeber 6, 2002; Wichmann admitted to Kimball that she had been told by Patterson to fix the "paperwork" cause of the dropout problem at SHS; Kimball warned Wichmann by email on November 5, 2002 that Melba Martin was inaccuartely reporting dropouts, and Martin's handwriting, with Dambrino's, is on the Smoking Gun; and Lozano informed Wichmann and Dambrino of her personal knowledge that the zero was wrong.

Cuadra had no reason on October 22, 2002 to disobey Wichmann's and Dambrino's directive to "clean up" data, or to believe his obedience was wrong.

The Fifth Circuit states, "In May 2003 . . . [Kimball] wrote a letter to Lester Blizzard ('Blizzard'), a Harris County Assistant District Attorney, and alleged that SHS administrators, including several of the named [Respondents], were responsible for the false dropout numbers. Blizzard contacted Aldrich . . . and requested a copy of Aldrich's completed report, which Aldrich sent in June 2003. Aldrich's report concluded that Cuadra knowingly changed student leaver codes without authorization. Ultimately, Blizzard decided not to prosecute Cuadra." (App. A, pg. 4a.)

Aldrich was an ex-Houston Police Officer who Blizzard and his successor Buess both knew. Blizzard conditioned his request for Aldrich's complete Report on whether Aldrich found "sufficient evidence of criminal wrongdoing" in his investigation incriminating Cuadra. In that event, Aldrich was to forward a copy of his Report to Blizzard "for further prosecution." Therefore, Aldrich's transmission of the Report to Blizzard was not simply Aldrich's cooperation with a request by Blizzard for information, but a statement by Aldrich that he had satisfied Blizzard's condition and found evidence which incriminated Cuadra. HISD hired Hardin for a "makeover" of Aldrich's investigation and ordered that Hardin's effort be sent to District Attorney Blizzard. Hardin was provided the accumulated material by Aldrich--*except* Hardin was not told about or given the Smoking Gun, which supported Cuadra's innocence by demonstrating that leaver codes made in Martin's handwriting[6] on the document appeared in the TEA's final dropout data for the 30 SHS students, certified by Wichmann not to be dropouts. Hardin's re-do of Aldrich's investigation implausibly concluded, as had Aldrich, that Cuadra's change of data was not authorized by Wichmann or Dambrino, and that Cuadra's alterations of data on October 22, 2002 had caused the submission of false data to the TEA. After receiving both Aldrich's and Hardin's report, Blizzard communicated to Hardin's Drumheller that he was not going to initiate a prosecution against Cuadra.

Cuadra exhausted his internal, administrative appeals. HISD published the Aldrich and Hardin reports.

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6. Martin's handwriting was identified by her former co-worker, Henry. Dambrino admits her handwriting also appears on the Smoking Gun.

Cuadra resigned his job at HISD's Transportation department in 2004.

In September 2005, Blizzard was reassigned and succeeded by ADA Terese Buess ("Buess"), who, like Blizzard, admittedly viewed the charges as misdemeanor, for which the statute of limitations barred prosecution. Buess, no stranger to the Bracewell & Giuliani firm (where her sister had practiced law), telephoned Respondents' counsel and reported that the prosecution was time-barred. Respondents' counsel suggested that there was still time to prosecute Cuadra with a felony, because the statute of limitations would not foreclose felony prosecution until October 22, 2005. Buess demurred that the felony was also time-barred. Respondents' counsel indicated that Buess was not looking at the correct statute. Buess acquiesced and agreed to proceed with a felony prosecution, but asked that she be provided by Respondents with all relevant documents. Buess, familiar with Aldrich, communicated with him about the case and documents, which she had requested.

Buess was ***not given*** the Smoking Gun. She was also ***not told***: Lozano knew in Spring 2002 there would be zero dropouts at the end of the year; the zero dropouts were ordained by Patterson; Wichmann and Dambrino, in Bonnette's presence, ordered Cuadra to return to school on Tuesday, October 22, 2002 to make data changes in "a folder" left at his desk; Tuesdays in October 2002 were days when Cuadra attended training; there were 30 reported dropouts for SHS on October 24, 2002, and 30 reported dropouts for SHS on November 6, 2002; Wichmann, Dambrino and Bonnette attempted to have Cuadra verify on January 27, 2003 that he was responsible for dropouts

when he was not, and he refused; Wichmann instructed Assistant Principal Monzon to verify on January 27, 2003 that he was responsible for dropouts when he was not, for which he was reprimanded; and Respondents withheld SHS Registrar Carraway's Documents which revealed that the final changes to create the zero dropouts had been made in the SASI's MIS screen, and the original student values in the AFI screens were unchanged.[7]

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7. The Carraway Documents are "screen shots" for each of the 30 students found on the Smoking Gun, without the names redacted, produced by HISD during the criminal prosecution of Cuadra under the "Business Records Affidavit" of SHS Registrar Tomesha Carraway, custodian of records for SHS ("Carraway Documents").

Each page is a print of the AFI screen for each student and reports variously the withdrawal or leaver code ("W/D RSN") and the date the code was originally entered. For example, student Blanca Aguirre's AFI screen reflects that she has a final withdrawal code in AFI of "04," originally entered on March 26, 2002. The summary of leaver codes shows that the leaver codes for the 20 students not marked as "99" were, according to AFI, the same on June 14, 2006 as they were on October 22, 2002.

The Carraway Documents prove that AFI leaver codes of June 14, 2006 are the same as the original and still extant leaver codes, and clearly support the fact that Cuadra's October 22, 2002 alterations to dropout data in AFI were not the final leaver code values recorded on those screens, and the leaver codes which had been originally recorded in AFI during the 2001-2002 school year remained the same through at least 2006.

Buess obtained the first indictment against Cuadra on October 7, 2005.[8] Cuadra was arrested and made bond. On October 11, 2005, after Cuadra was indicted, Kimball obtained an interview with Buess and provided her with documents including the Smoking Gun, whether she knew it or not. Buess did say in her deposition that she didn't give great weight to Kimball.

Cuadra's defense attorney challenged the first indictment. Buess obtained a second indictment in May 2006.

In pre-trial communications between Buess and Cuadra's defense attorney, Matthew Hennessy, on or about October 26, 2006, Buess first **knowingly** received a copy of the Smoking Gun.

It was clear Buess did not recall having the Smoking Gun before receiving it from Hennessy on October 26, 2006. **Specifically, Buess was asked in her deposition why the Smoking Gun, received from Hennessy on October 26, 2006, was "a surprise . . . if [she] had been given a copy of that [document] by Kimball on October 11, 2005?"** Buess replied, "A [by Buess] Because at that point, I had so much paper that **I wasn't recalling that I had that in my file.** Q [by Petitioner's attorney, Watts] You just didn't remember it? A [Buess] I didn't remember it. Q [Watts] And you didn't remember it until after when? A

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8. The initial indictment against Cuadra stated that on or about October 22, 2002, Cuadra unlawfully and knowingly made a false alteration of a governmental record, namely a public school record (Exhibit A) and Cuadra's actions were done with intent to defraud and harm another. Exhibit A was the PEIMS Data Review Dropout Roster printed on October 23, 2002 at 4:39 p.m.

[Buess] I don't know. When I was flipping back through the boxes. Q [Watts] After the indictments were dismissed? A [Buess] **I don't remember when. I just realized it was there in the box and I had had it all along.**" (Emphasis added.)

Buess telephoned Aldrich on October 26, 2006. Aldrich recalls Buess said, "The defense has produced a dropout roster [the Smoking Gun] with notes in [Martin]'s handwriting and [Buess] wants [Aldrich] to look at it to see if [Aldrich] **remembers where it came from**." (Emphasis added.)

Buess then faxed to Aldrich "a copy of [the Smoking Gun] . . . provided to [Buess] by [Cuadra's defense attorney] Mr. Hennessy."

Specifically, Buess testified when she faxed the Smoking Gun to Aldrich on October 26, 2006, she knew that it was not Cuadra's handwriting. In that communication with Aldrich, Buess said to him, "They're [Hennessy] presenting [the Smoking Gun] to me [Buess] as [Martin]'s handwriting . . . .", find out if it is Martin's handwriting, whose handwriting it is. In their next communication, Aldrich told her that "it was not [Martin]'s handwriting." According to Martin's coworker it was indeed Martin's handwriting.

When Buess asked Aldrich what the Smoking Gun was and where it came from, **Aldrich did not tell Buess** that Dambrino's handwriting was on the document.

Andy Drumheller, a shareholder of Hardin, confirmed HISD/Aldrich never provided the Smoking Gun to Hardin.

Significantly, Aldrich's notes of his April 1, 2003 interview with Cuadra indicate Aldrich was aware he possessed the Smoking Gun. Whether Aldrich withheld the document from Buess is a material fact question.

As to what prompted Buess to dismiss the charges against Cuadra, she stated, "I recall, after talking with Matt Hennessy and after an explanation, I went back to [Aldrich], relayed that explanation to him. I remember talking to Marmion Dambrino and I recall saying [to Aldrich] we needed to check it out. I wanted to know whose handwriting that was [on the Smoking Gun]. I believed I knew whose it was. I wanted to know if it was Melba Martin's handwriting. I knew it wasn't [Cuadra's]." Buess dismissed the charges on the basis of what Hennessy gave to her on October 26, 2006.

Whether the Smoking Gun was important to the indictments and dismissal of the indictments of Cuadra is a material fact question in light of Buess' reaction when that document, *and only that document*, was produced to her by Hennessy on October 26, 2006. She asked Aldrich and Dambrino to identify the handwriting's author(s) and where the document "came from." Receiving no answers, she dismissed the case. If Buess knew she had a copy of the Smoking Gun in her possession, then why did she probe its origin and handwriting's author only upon receiving it from Hennessy?

The document's meaning, as Buess explained to, and as understood by, Aldrich on October 26, 2006 is found in Aldrich's telephone log: "[Buess] is concerned that the record of Blanca Aguirre MISCRT screen has a note that

says she transferred . . . but the code (04) means she was entering the military. . . ."

Unsatisfied with Aldrich's responses, on November 1, 2006, Buess dismissed the criminal charge against Cuadra, and issued a Press Statement, which states,

> The indictments returned by the 338th and 228th District Court Grand Juries in October of 2005 and May of 2006 alleged that Cuadra had tampered with the 2002 dropout report from Sharpstown High School. **In seeking these indictments,** this office relied upon circumstantial evidence that had been assembled and examined by the Houston Independent School District (HISD) Office of Professional Standards, as well as by private counsel Rusty Hardin & Associates, who had performed an independent evaluation at the request of HISD.
>
> In the past week, for the first time, Mr. Cuadra's defense attorney detailed to our office his specific defenses against the accusation. These defenses **had not been provided to** the HISD Office of Professional Standards, the staff of Rusty Hardin & Associates, or **the 338th or 228th District Court Grand Juries.**

(Emphasis added.)

ARGUMENT

When reviewing a grant of summary judgment, the Fifth Circuit does so *de novo*, applying the same standard required of the district court. Summary judgment is improper if the pleading, discovery and disclosure materials on file, and any affidavits, show that there is a genuine issue of a material fact. *Shields v. Twiss*, 389 F.3d 142, 149 (5th Cir. 2004). The trial court, and therefore the court of appeals, is compelled to construe all facts and inferences in the light most favorable to the nonmoving party when weighing a motion for summary judgment. The nonmoving party must come forward with specific facts showing that there is a genuine issue for trial. An issue is "genuine" if the evidence is sufficient for a reasonable jury to return a verdict for the non-moving party. A fact is "material" if its resolution in favor of one party might affect the outcome of the lawsuit under governing law.

The Fifth Circuit noted, "Cuadra alleges that the [Respondents] violated his Fourth Amendment rights by intentionally withholding information and manipulating evidence to procure the indictment." (App. A, pg. 8a.)

Cuadra was successively indicted by the grand juries of two courts, according to the prosecutor, because the District Attorney and the grand juries had "relied upon circumstantial evidence . . . assembled and examined by [Aldrich], as well as by . . . [Hardin], who had performed an independent evaluation at the request of HISD."

The Fifth Circuit ignored Cuadra's having come forward with specific facts showing there is a genuine issue for trial.

Specifically, fact issues were raised that ADA Buess, as an intermediary, would not have sought, and the grand juries would not have voted for, indictment of Cuadra, had Buess had the information provided to her by Cuadra's defense attorney, Hennessy, on October 26, 2006, which she characterized as "defenses" in her Press Statement. The only document provided to her by Hennessy was the Smoking Gun. Buess did not receive the Smoking Gun (or Carraway's Documents, along with other material facts) from Aldrich.

Buess' deposition testimony is clear that she was truly unaware Kimball had provided her with the Smoking Gun on October 11, 2005, and did not become aware of the document's existence amongst the boxes of papers maintained by her in this case, until later . . . after October 26, 2006. Buess apparently attempted to help Aldrich and Hardin when writing her affidavit by stating that neither had the Smoking Gun information. In fact, Aldrich did have it, and Hardin didn't have it because Aldrich had never provided the document.

Hardin's Drumheller testified he never talked to Buess about the Smoking Gun information, and never told Buess he did not have the document. A fact issue exists as to Buess' motivation and accuracy.

The Fifth Circuit notes that the chain of causation for a wrongful arrest, presumably seizure and criminal prosecution short of trial, is broken by an intermediary's decision. The court went on to say, "However, the chain of causation remains intact if 'it can be shown that the deliberations of that intermediary were in some way tainted by the actions of the defendant.' *Hand v. Gary*,

838 F.2d 1420, 1428 (5th Cir. 1988)." (App. A, pg. 10a.) The court then states, "both Buess and two separate grand juries qualified as independent intermediaries. Cuadra's *mere allegations* of 'taint,' without more, are insufficient to overcome summary judgment. *Taylor* [*v. Gregg*], 36 F.3d [453] at 457 [(5th Cir. 1994)] (emphasizing that the 'taint' must be *shown* and finding no summary judgment evidence to support assertions that an intermediary relied on an officer's false report)." *Id.* (Emphasis added.) Cuadra alleged specific facts of "taint," so the court misstated Cuadra has "not raised a fact issue as to whether any of the [Respondents] knowingly withheld the 'smoking gun' document or any other . . . exculpatory information, thereby tainting Buess's independent decision to seek Cuadra's indictments or either grand jury's decision to return the indictments." (App. A, pg. 10a.)

Aldrich was given the Smoking Gun by Kimball on February 20, 2003, along with information which supported Cuadra's innocence of having unilaterally decided to make changes to student dropout data on October 22, 2002, i.e. without authorization or instruction of Wichmann and/or Dambrino.

Aldrich knew of the Smoking Gun's existence and that he had it in his possession on April 1, 2003, to which he alluded in his second interview with Cuadra.

Aldrich doesn't know if he gave the Smoking Gun to Buess or Hardin, but Hardin's Drumheller says Aldrich did not provide the document to Hardin.

Buess, in her Press Statement, uses a global reference ("these defenses") to refer to the Smoking Gun, *the only*

document provided to her by Hennessy. She states, "These defenses had not been provided to [Aldrich], the staff of [Hardin], or the 338th or 228th District Court Grand Juries."

Buess' ignorance of the Smoking Gun was the basis for Cuadra's indictments. Specifically, Buess says she had boxes of paper related to this case and was surprised to later see the Smoking Gun document in her files.

Most importantly, evidence that the Smoking Gun with Martin's and Dambrino's handwriting had been knowingly withheld from Buess is found in the conduct of Aldrich and Dambrino on October 26, 2006.

Buess was "blindsided" by Hennessy's production of the Smoking Gun, and the part it played in deciphering the time line of post-October 22, 2002 events.

The Fifth Circuit remarks that the Smoking Gun isn't dated. The Smoking Gun, though undated as to creation, points to the date of its use in its "leaver codes," when read in light of the TEA's dropout status for the students. It becomes very clear that the Smoking Gun was used as a form upon which Martin and Dambrino made their notes, and the notes were to turn dropouts into non-dropouts.

The proof that Aldrich and, at least, Dambrino knowingly withheld from Buess information about the Smoking Gun is that on October 26, 2006, Aldrich and Dambrino discussed Buess' report of her receipt of the Smoking Gun, and her questions of where it came from and whose handwriting it bore. Although Dambrino had written on the Smoking Gun, and later admitted that

it bore her handwriting, Buess wasn't told. Although Dambrino, Martin's supervisor, obviously knew Martin's handwriting, Buess was told it was not Martin's handwriting on the document. Although Henry had identified Martin's handwriting on the Smoking Gun to Hennessy, Aldrich and Dambrino "wouldn't tell."

The Smoking Gun was not the only information exculpatory of Cuadra, or at least inculpatory of Wichmann, Dambrino, Patterson, and Martin, which Aldrich and Dambrino didn't share with Buess.

Aldrich made no disclosure to Buess of the following facts: 1) on February 20, 2003, Kimball had verified Cuadra's version of the events of October 22-23, 2002; 2) Dambrino recorded in her notes that there were 30 dropouts on October 24, 2002; 3) Lozano told Aldrich that she personally knew and had reported to Wichmann and Dambrino that a student listed as a non-dropout had dropped out to take care of her baby and refused a GED; and 4) the AFI screens where Cuadra made his changes on October 22, 2002 revealed original, pre-October 22, 2002 values even into June 2006. There were other facts not disclosed to Buess which Buess conceded in her deposition would have been significant.

The Fifth Circuit says that "Cuadra failed to create a fact issue on several of those elements" to the common law claim of malicious prosecution. (App. A, n.6.)

The Fifth Circuit states, "Cuadra has not show that any of the [Respondents] initiated or procured his prosecution." *Id.* In fact, *King v. Graham*, 126 S.W.3d 75 (Tex. 2003), states, "a person who provides false

information cannot complain if a prosecutor acts on it; he cannot be heard to contend that the prosecutor should have known better. Such a person ***has procured the resulting prosecution***, regardless of the actions of the prosecutor, and ***the causation element for malicious prosecution is satisfied***." (Emphasis added.) When Aldrich and Dambrino, with Martin, Wichmann, Patterson, and Bonnette, failed to disclose the Smoking Gun information or other material facts to Buess to have Cuadra indicted, causation was satisfied.

Certainly the other common law elements of malicious prosecution have been satisfied. The criminal action was commenced against Cuadra when Respondents' counsel guided Buess from a time-barred misdemeanor to a nearly time-barred felony in September 2005, and Aldrich supplied documents and information to Buess to support the rush to indict. The prosecution was initiated or continued "by or at the insistence of the [Respondents]," *Texas Beef Cattle Co. v. Green*, 921 S.W.2d 203, 207 (Tex. 1996), or with their varying levels of aid.

It is worth noting that Buess never claims to have read either Aldrich's or Hardin's reports, placed by her predecessor, Blizzard, in the back of his desk drawer. Buess only indicates scant knowledge of the accusations against Cuadra until she made was she apparently believed to be a perfunctory, lawyer-to-lawyer call to inform Respondent's counsel, Ms. Schneider-Vogel, of the time-barred misdemeanor prosecution. That conversation ignited a felony prosecution. Buess asked Schneider-Vogel and Aldrich for files and documents, forced by the deadline of October 22, 2005.

According to Buess, as cited by the Fifth Circuit, the Smoking Gun was not considered exculpatory. (*See* App. A, pg. 10a.) Yet, when considering her conversations of October 26, 2006 with Aldrich, her Press Statement of November 1, 2006, and her deposition testimony, it is clear that, but for the withholding or non-disclosure of the Smoking Gun, she would not have sought the indictments, and, but for the production of the Smoking Gun, she would not have dismissed the indictment on November 1, 2006.

Material fact questions emanate from Aldrich's refusal to produce the document, refusal to tell Buess on October 26, 2006 of Dambrino's handwriting on the document, and falsely reporting to Buess on October 26, 2006 that he had investigated or inquired to discover if it was Martin's handwriting on the Smoking Gun, and it was not.

The evidentiary items establishing Cuadra's innocence are several. Cuadra was instructed by Wichmann and Dambrino to make changes on October 22, 2002. He made the ordered changes on condition that he would reverse them for Martin to address when available. The changes and restoration to original values performed by Cuadra were in the AFI screen, verifying even in 2009 the leaver codes for the 30 students on the subject dropout report remained at pre-October 22, 2002 values. The Smoking Gun reveals that Martin's handwriting changes the leaver codes from dropouts to non-dropouts, as appears on the final report submitted to TEA.

Respondents maliciously accused Cuadra of changing 30 dropout leaver codes on October 22, 2002 to zero, which remained at zero through January 27, 2003.

Dambrino and Wichmann are in conflict as to the events of October 22, 2002, and their credibility regarding that date is a material question.

The number of dropouts bounced back to 30 on October 24, 2002, down to zero on November 5, 2002, down to zero on November 5, 2002, back to 30 on November 6, 2002, down to zero on December 6, 2002-January 27, 2003. At no time in that period was Cuadra involved in any SASI data editing.

In addition to the panel's failure to construe facts and inferences in favor of Cuadra, the panel apparently added to the state common law elements of malicious prosecution and required Cuadra to create a fact issue as to whether any of the Appellees "actively sought his indictment." (App. A, n. 6.)

Taylor v. Gregg, 36 F.3d 453, 455 (5th Cir. 1994), states, "To prevail on a malicious prosecution claim in Texas, the Fifth Circuit requires the plaintiff to show that (1) a criminal action was commenced against him; (2) the prosecution was caused by the defendant or with his aid; (3) the action terminated in the plaintiff's favor; (4) the plaintiff was innocent; (5) the defendant acted without probable cause; (6) the defendant acted with malice; and (7) the criminal proceeding damaged the plaintiff."

When the panel concluded that "Cuadra has not raised a fact issue as to whether any of the Appellees knowingly withheld the 'smoking gun' document or any other allegedly exculpatory information, thereby tainting Buess' independent decision to seek Cuadra's indictment or either grand jury's decision to return the indictments," (App. A,

pg. 10a), the panel chose to weigh Buess' testimony, ignore the Press Statement's clear meaning, and construe both in favor of Respondents.

Although the panel cites *Shields v. Twiss*, 389 F.3d 142 (5th Cir. 2004) and *Murray v. Earle*, 405 F.3d 278 (5th Cir. 2005), it appears lip-service only is paid to "construi[ing] all facts and inferences in the light most favorable to the nonmoving party when reviewing grants of motions for summary judgment." It does not appear that the panel "delved through the record to set forth all of the facts in a light most favorable to [Cuadra]." *Sanders v. English*, 950 F.2d 1152, 1159 (5th Cir. 1992).

"*Castellano* does permit a plaintiff to assert a Fourth Amendment claim based on an arrest made without probable cause . . . . [but] [t]his circuit has held, however, that once 'facts supporting an arrest are placed before an independent intermediary such as a . . . grand jury, the intermediary's decision breaks the chain of causation' for these constitutional violations. . . . ***Nevertheless, these claims may be maintained if the plaintiff affirmatively shows that 'the deliberations of that intermediary were in some way tainted by the actions of the defendants.***'" *Shields* at 150. (Emphasis added.)

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Honorable Court grant Certiorari to review the merits of the case.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED NOVEMBER 17, 2010

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-20715

KENNETH CUADRA

Plaintiff - Appellant

v.

HOUSTON INDEPENDENT SCHOOL DISTRICT; CAROL WICHMANN; MARMION DAMBRINO; BILLY ALDRICH; BETH BONNETTE; MELBA MARTIN; ANNE PATTERSON

Defendants - Appellees

Appeal from the United States District Court for the Southern District of Texas

Before JONES, Chief Judge, and REAVLEY and HAYNES, Circuit Judges.

HAYNES, Circuit Judge:

Kenneth Cuadra ("Cuadra") appeals a grant of summary judgment for the Houston Independent School District ("HISD") and several HISD personnel (collectively "Appellees") on his 42 U.S.C. § 1983 claims.

Appendix A

Cuadra filed suit against the Appellees after he was indicted and subsequently arrested in connection with a falsified student drop-out report sent to the State of Texas by Sharpstown High School ("SHS"). Because we find that Cuadra failed to raise a genuine issue of material fact as to any of his constitutional claims, we AFFIRM the district court's grant of summary judgment for the Appellees.

I. Facts and Procedural History

Cuadra served as a network specialist at SHS until August 2004. As part of his job responsibilities, Cuadra played a role in the school's required annual reporting of student drop-out data to the State of Texas. SHS uses a computer program known as SASI to maintain official records of student data, including student drop-out information. Once data is entered into the SASI program, it can be uploaded to HISD's Public Education Information Management System ("PEIMS"). Data in the PEIMS system is then transferred to the Texas Education Agency ("TEA") via a server known as TEA Edit Plus. Cuadra and Melba Martin ("Martin"), an attendance clerk at SHS, had access to SASI to edit data for "leavers," students who were enrolled or attended the school at some point during the previous school year, but did not re-enroll in the fall. Martin was responsible for inputting or editing "leaver codes," numbers referencing the reason why a student left school. Some of these codes indicated that the student qualified as a "drop-out," while other codes gave other reasons for leaving, such as a family move to another city. Only Cuadra could upload the student drop-out data to the PEIMS program, and this data was periodically sent to the TEA.

Appendix A

Cuadra claims that, on October 22, 2002, Assistant Vice Principal Marmion Dambrino ("Dambrino") and Principal Carol Wichmann ("Wichmann") told him to randomly delete ten to fifteen names from the student drop-out list in anticipation of a meeting with General Superintendent Kaye Stripling ("Stripling").[1] Cuadra admitted that he removed some names from the list on the night of October 22nd. Computer log-in information indicated that Cuadra's ID was the only one used to log on to the system between the evening of October 22nd and the afternoon of October 23rd. During this time frame, the SHS student data report changed from listing thirty drop-outs to listing zero drop-outs.[2]

Sometime after making the changes to the student drop-out data, Cuadra claimed that he accessed the SASI program again and changed the information back. Cuadra alleged that Martin later changed the drop-out data again to show zero drop-outs. Cuadra alleged that the Appellees knew the drop-out numbers were incorrect and tried to cover up their part in the false reporting by pinning responsibility for it on him.

In February of 2003, a local news station reported that SHS had falsified its student drop-out data. Soon after, Billy Aldrich ("Aldrich"), a member of the HISD

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1. Dambrino and Wichman dispute Cuadra's account.

2. The last student data report, printed at 4:39 p.m. on October 23rd, served as the foundation for Cuadra's subsequent criminal indictment for knowingly making a false alteration to a government record.

Department of Professional Standards, commenced an investigation into the matter at the request of Anne Patterson ("Patterson"), Superintendent of HISD's West District. During the course of his investigation, Aldrich spoke to HISD and SHS employees and interviewed Cuadra twice. In both interviews with Aldrich, Cuadra did not disclose that anyone asked him to change the drop-out data.

In May 2003, Assistant Principal Robert Kimball ("Kimball") wrote a letter to Lester Blizzard ("Blizzard"), a Harris County Assistant District Attorney, and alleged that SHS administrators, including several of the named Appellees, were responsible for the false drop-out numbers. Blizzard contacted Aldrich after receiving Kimball's letter and requested a copy of Aldrich's completed report, which Aldrich sent in June 2003. Aldrich's report concluded that Cuadra knowingly changed student leaver codes without authorization. Ultimately, Blizzard decided not to prosecute Cuadra.

After Cuadra initiated an internal grievance, complaining that he was the false target of Aldrich's investigation, HISD decided to hire outside counsel, the law firm of Rusty Hardin and Associates, to conduct an independent investigation into the events. The findings of two attorneys from the firm ("Hardin report") confirmed the allegation that Cuadra knowingly changed leaver codes listed on the PEIMS student drop-out report sent to the TEA without authorization on October 22nd or October 23rd. After reviewing the Hardin report, HISD's Deputy Superintendent Abe Saavedra ("Saavedra") denied

Cuadra's grievance and recommended that the report be sent to the Harris County District Attorney's office for an independent determination of potential criminal liability of any individual involved. Cuadra was again re-assigned, this time to the HISD Bus Barn. Cuadra lost another grievance related to this re-assignment and eventually resigned in August 2004.

On October 7, 2005, Tess Buess ("Buess"), District Attorney Blizzard's replacement, sought and obtained a grand jury indictment against Cuadra for knowingly making a false alteration to a government record.[3] Cuadra was arrested and released on bond following the indictment, which was eventually quashed. However, another grand jury subsequently re-indicted Cuadra in May 2006.

A few days after a conversation with Cuadra's defense attorney in October 2006, Buess dismissed the second indictment against Cuadra and issued a press release on the same day. Cuadra contends that Buess dismissed the indictment because of a document she received from Cuadra's defense attorney that Cuadra deems the "smoking gun."[4] Cuadra argues that at least one of the

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3. That indictment against Cuadra stated that on or about October 22, 2002, Cuadra unlawfully and knowingly made a false alteration of a governmental record, namely a public school record (Exhibit A) and Cuadra's actions were done with intent to defraud and harm another. Exhibit A was the PEIMS Data Review Drop-out Roster printed on October 23, 2002 at 4:39 p.m.

4. This document is a portrait-printed roster of the names of thirty students alongside six columns of data with two sets of

Appellees possessed this document and did not disclose it to Buess prior to his indictments.

Cuadra filed the instant 42 U.S.C. § 1983 suit in federal district court. The Appellees moved for summary judgment on all of Cuadra's claims, and Cuadra then moved for partial summary judgment on his First and Fourteenth Amendment claims, the only claims that are the subject of this appeal. Ultimately, the district court dismissed Cuadra's action with prejudice and denied Cuadra's post-judgment motion. This timely appeal followed.

II. Standard of Review

The Fifth Circuit reviews a grant of summary judgment de novo, applying the same standard as the district court. *Shields v. Twiss*, 389 F.3d 142, 149 (5th Cir. 2004). Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). This court "construes all facts and inferences in the light most favorable to the nonmoving party when reviewing grants of motions for summary judgment." *Murray v. Earle*, 405 F.3d 278, 284

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handwriting on it. Dambrino's handwriting is on the bottom of the document. Cuadra alleged that Martin's handwriting was the other set. He asserts that this document proves his innocence because the handwritten information matches the codes entered for each student that eventually resulted in a zero drop-out report to the Texas Education Agency. The document has no date on it.

(5th Cir. 2005). Where the burden of production at trial ultimately rests on the nonmovant, "the movant must merely demonstrate an absence of evidentiary support in the record for the nonmovant's case." *Shields*, 389 F.3d at 149. Then, "the nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Id.* (citing FED. R. CIV. P. 56(e)). "An issue is 'genuine' if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party." *Hamilton v. Seque Software, Inc.*, 232 F.3d 473, 477 (5th Cir. 2000). "A fact issue is 'material' if its resolution in favor of one party might affect the outcome of the lawsuit under governing law." *Id.* The Fifth Circuit may "affirm a grant of summary judgment on any grounds supported by the record and presented to the [district] court." *Hernandez v. Velasquez*, 522 F.3d 556, 560 (5th Cir. 2008).

III. Discussion

Cuadra challenges the summary judgment entered on his Fourth and Fourteenth Amendment claims.[5] We address each issue in turn.

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5. Cuadra asserted a litany of other constitutional violations at various times throughout these proceedings, including a Fourteenth Amendment equal protection claim, First Amendment retaliatory prosecution claims, and conspiracy claims. Because Cuadra failed to brief any of these claims in his initial brief to this court, he has waived them. *See Yohey v Collins*, 985 F.2d 222, 225 (5th Cir. 1993) ("This Court will not consider a claim raised for the first time in a reply brief.") (internal citations omitted).

Appendix A

A. Cuadra's Fourth Amendment Claims

1. No Free-Standing Malicious Prosecution Claim

Cuadra alleges that the Appellees violated his Fourth Amendment rights by intentionally withholding information and manipulating evidence to procure his indictment. To the extent that Cuadra alleges that the Appellees violated his constitutional rights by engaging in malicious prosecution, that argument is foreclosed by our decision in *Castellano v. Fragozo*, 352 F.3d 939, 958 (5th Cir. 2003) (en banc). In *Castellano*, we noted that "[t]he initiation of criminal charges without probable cause may set in force events that run afoul of explicit constitutional protection--the Fourth Amendment if the accused is seized and arrested, for example, or other constitutionally secured rights if a case is further pursued." *Id.* at 953. However, we held that a freestanding 42 U.S.C. § 1983 claim based solely on malicious prosecution was not viable. *Id.* at 942. Rather, the claimant must allege "that officials violated specific constitutional rights in connection with a 'malicious prosecution.'" *Id.* at 945. Thus, Cuadra's attempt to assert a free-standing § 1983 malicious prosecution claim fails as a matter of law.[6]

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6. Even if we were to reach the common law elements of malicious prosecution to determine whether the Appellees' actions led to violations of Cuadra's Fourth Amendment rights, we find that Cuadra failed to create a fact issue on several of those elements. To establish a Texas common law claim for malicious prosecution, the plaintiff must show: (1) a criminal action was commenced against him; (2) the prosecution was caused (initiated or procured) by the defendant or with his aid; (3) the action terminated in the plaintiff's

2. Independent Fourth Amendment Violations

Cuadra has not raised a genuine issue of material fact as to any other possible violation of his Fourth Amendment rights. Cuadra explicitly waived a false arrest claim in the district court. Although Cuadra alleges he was the subject of an "unreasonable seizure," he has not shown that his arrest occurred "in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests." *Glenn v. City of Tyler*, 242 F.3d 307, 313 (5th Cir. 2001).

Even if we considered either a false arrest or unreasonable seizure claim, Cuadra has failed to raise a fact issue as to lack of probable cause, a necessary component of each claim. "Probable cause exists when the totality of the facts and circumstances within a police officer's knowledge at the moment of arrest are sufficient for a reasonable person to conclude that the suspect had committed or was committing an offense." *United States v. McCowan*, 469 F.3d 386, 390 (5th Cir. 2006). We have held that "if facts supporting an arrest are placed before

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favor; (4) the plaintiff was innocent; (5) the defendant acted without probable cause; (6) the defendant acted with malice; and (7) the criminal proceeding damaged the plaintiff. *Taylor v. Gregg*, 36 F.3d 453, 455 (5th Cir. 1994), *overruled in part by Castellano*, 352 F.3d 939; *Richey v. Brookshire Grocery Co.*, 952 S.W.2d 515, 518 (Tex. 1997). Cuadra has not shown that any of the Appellees initiated or procured his prosecution, as the evidence shows that the Appellees did not influence Buess and merely cooperated with her during her independent investigation. Cuadra also created no fact issue as to whether any of the Appellees actively sought his indictment.

an independent intermediary such as a magistrate or grand jury, the intermediary's decision breaks the chain of causation for false arrest, insulating the initiating party." *Taylor*, 36 F.3d at 456. However, the chain of causation remains intact if "it can be shown that the deliberations of that intermediary were in some way tainted by the actions of the defendant." *Hand v. Gary*, 838 F.2d 1420, 1428 (5th Cir. 1988). "[T]he chain of causation is broken only where all the facts are presented to the grand jury, or other independent intermediary where the malicious motive of the law enforcement officials does not lead them to withhold any relevant information from the independent intermediary." *Id.*

Here, both Buess and two separate grand juries qualified as independent intermediaries. Cuadra's mere allegations of "taint," without more, are insufficient to overcome summary judgment. *Taylor*, 36 F.3d at 457 (emphasizing that the "taint" must be *shown* and finding no summary judgment evidence to support assertions that an intermediary relied on an officer's false report). Cuadra admitted to changing the student drop-out data on October 22nd, which alone should suffice to establish probable cause for his indictments. Despite the alleged significance of the "smoking gun," Buess testified in her deposition that she did not consider the document exculpatory, and it was in her possession before she sought Cuadra's re-indictment. Cuadra has also not raised a fact issue as to whether any of the Appellees knowingly withheld the "smoking gun" document or any other allegedly exculpatory information, thereby tainting Buess's independent decision to seek Cuadra's indictments or either grand jury's decision to return the indictments.

As Cuadra has failed to raise a fact issue as to any potential Fourth Amendment violation, we AFFIRM the district court's grant of summary judgment in favor of the Appellees on this issue.

B. Cuadra's Fourteenth Amendment Substantive Due Process Claim

Cuadra preserved for appeal only one Fourteenth Amendment substantive due process claim based on his prosecution.[7] We find such a claim foreclosed by the Supreme Court's decision in *Albright v. Oliver*, 510 U.S. 266 (1994). In *Albright*, the Court held that there was no Fourteenth Amendment "liberty interest" or substantive due process right to be free from criminal prosecution unsupported by probable cause. *Id.* at 270-71; *Castellano*, 352 F.3d at 946-47. Rather, "[w]here a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of

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7. Cuadra's other Fourteenth Amendment claims were time-barred. The applicable limitations period for 42 U.S.C. § 1983 claims is governed by reference to the most analogous cause of action under state law. *Owens v. Okure*, 488 U.S. 235, 236 (1989). Under the general Texas tort statute, Cuadra had two years after the day the cause of action accrued to bring his claims. TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (Vernon 2005). Federal law determines the date of accrual for § 1983 claims. *Jackson v. Johnson*, 950 F.2d 263, 265 (5th Cir. 1992). A general cause of action accrues when the plaintiff becomes aware that he has suffered an injury or has sufficient information to know that he has been injured. *Id.* As the events Cuadra complained of in most of his Fourteenth Amendment claims occurred in 2004, and Cuadra did not file suit until 2007, those claims were time-barred.

government behavior, 'that Amendment, not the more generalized notion of 'substantive due process' must be the guide for analyzing these claims.'" *Albright*, 510 U.S. at 273 (internal citations omitted). Thus, the *Albright* Court held that the plaintiff's claims based on prosecution without probable cause were best analyzed under the Fourth Amendment, as the "Framers [of the Constitution] considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it." *Id.* at 274.

Cuadra's Fourteenth Amendment claims are based on alleged pretrial deprivations of his constitutional rights and, under the holding in *Albright*, such claims should be brought under the Fourth Amendment. Cuadra attempts to support his Fourteenth Amendment due process claims by citing the Supreme Court's holding in *Napue v. Illinois*, where the Court stated that "a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction . . . ." 360 U.S. 264, 269 (1959). However, Cuadra was not *convicted* of a crime based on false evidence. Rather, he complains of alleged deprivations of his pretrial rights resulting from his indictments. Such a claim is not a viable Fourteenth Amendment claim. Thus, we AFFIRM summary judgment for the Appellees on Cuadra's Fourteenth Amendment substantive due process claim.

IV. Conclusion

For the forgoing reasons, we AFFIRM the grant of summary judgment for the Appellees.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION, DATED SEPTEMBER 11, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-07-3300

KENNETH CUADRA,

Plaintiff

v.

HOUSTON INDEP. SCHOOL DIST., et al.

Defendants.

OPINION AND ORDER

Before the Court is a Report and Recommendation from the United States Magistrate Judge which recommends that the Defendants' Motion for Summary Judgment be granted and that this action which was filed by Plaintiff Kenneth Cuadra be dismissed. Cuadra filed his objections to the Report and Recommendation in a timely manner. Defendants filed a timely Response to Cuadra's objections.

This Court, having given this matter *de novo* review pursuant to 28 U.S.C. § 636(b)(l)(C), concludes that

Cuadra's objections are without merit and, therefore, now Accepts and Adopts the Report and Recommendation of the Magistrate Judge.

Accordingly, it is Ordered that Defendants' Motion for Summary Judgment (Instrument no. 80) is **Granted;** that Cuadra's Motion for Partial Summary Judgment (Instrument no. 87) is **Denied;** and that Cuadra's action is hereby **Dismissed with prejudice.**

SIGNED at Houston, Texas, on this 11 day of September, 2009.

/s/
DAVID HITTNER
United States District Judge

APPENDIX C — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION, FILED AUGUST 17, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-07-3300

KENNETH CUADRA,

Plaintiff

v.

HOUSTON INDEP. SCHOOL DIST., et al.

Defendants.

REPORT AND RECOMMENDATION

Before the Court, by referral from the Honorable David Hittner, United States District Court Judge, is Defendants' Motion for Summary Judgment (Docket Entry ("Doc.") No. 80), to which Plaintiff filed his Response in Opposition (Doc. No. 130), and Defendants filed a Reply. (Doc. No. 134). Also before the Court is Plaintiff's Motion for Partial Summary Judgment (Doc. No. 87) to which Defendants have filed their Response and Objections. (Doc. No. 109). The Court now submits this Report and Recommendation to the District Court

after careful consideration of the motions, the numerous exhibits of the parties, the responses[1] and reply, and the applicable law.

I. BACKGROUND

Plaintiff Kenneth Cuadra brings this action under 42 U.S.C. § 1983 against Defendants Houston Independent School District, Carol Wichmann, Marmion Dambrino, Melba Martin, Anne Patterson, Billy Aldrich, and Merrie Bonnette. Cuadra alleges that Defendants violated his First, Fourth, and Fourteenth Amendment rights and conspired against him to violate his Constitutional rights. Cuadra also seeks to impose governmental liability under § 1983 against HISD.

Kenneth Cuadra ("Cuadra") was employed with the Houston Independent School District ("HISD"). Cuadra worked for HISD as a network specialist at Lee High School and, in August 2000, he transferred to Sharpstown High School ("SHS") where he became the network specialist for the school. Cuadra's claims against

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1. The Court notes that Defendants have objected to Plaintiff's Response (Doc. No. 130) on the basis that it was late and on the basis that Plaintiff, after being permitted to cure his error and file his response correctly, filed a completely different response than that which he previously served, but had not filed, upon them. The Court, while mindful of Defendants' frustrations, does not believe they have been prejudiced as a result and, therefore, overrules their objections. For purposes of its Report and Recommendation, this Court has fully considered Plaintiff's Response (Doc. No. 130) filed on May 26, 2009.

Appendix C

Defendants stem from a series of events that began during the fall semester of 2002 at SHS involving student drop-out data and reports.

The State of Texas requires public schools to maintain and annually report data concerning student drop-outs. During the 2002-2003 reporting year,[2] official record keeping for student data, including but not limited to drop-outs, was maintained by HISD at the local school level with a DOS-based computer program known as SASI. In other words, each of the particular schools within HISD would enter its own drop-out information into the SASI program. The student drop-out data at SHS was entered on two principal computer "screens" within the SASI program, one known as the "MIS" screen and the other known as the "AFI" screen, with MIS controlling or overriding the AFI screen. (Doc. No. 130, Ex. W at 43). Once contained within the SASI program, data can then be uploaded to HISD's Public Education Information Management System ("PEIMS") and various reports can be generated. The data received into PEIMS data is later transferred from the various school districts to the State of Texas's Education Agency via a "master, student information server known as 'TEA Edit Plus.'" (Doc. No. 34 at 9, ¶ T).

At SHS, Cuadra and Melba Martin ("Martin") each had access to the SASI program to edit, alter or modify the school's student drop-out data in the SASI program.

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2. There is a year delay in reporting a school's drop-out data, therefore, the 2001-2002 school year data is reported in the subsequent year.

Cuadra does not contest the scope of his access to SASI, but maintains that Martin was responsible for inputting or editing the drop-out data into SASI and, once she had completed her task, he would upload the data to the District's central office and generate the necessary reports. (Doc. No. 34 at 10, ¶ A.2).

On or around October 22, 2002, Cuadra was attending an off-campus training session when he was paged by the school. Cuadra phoned the school and initially spoke to Dr. Robert Kimball ("Kimball") who informed him that Principal Carol Wichmann ("Wichmann") and Assistant Vice Principal Marmion Dambrino ("Dambrino") needed to speak with him. Cuadra was transferred to Dambrino who informed him that he needed to return to the SHS campus to complete some work that Wichmann needed for a meeting the next day with General Superintendent Kaye Stripling ("Stripling"). Cuadra returned to the school and found a folder on his desk containing the work assignment. Although the nature of the work assignment is disputed,[3] Cuadra claims that he did as he was requested and, through the AFI screen of the SASI program, after printing screen shots, he deleted student names from the drop-out data. (Doc. No. 34 at 11, ¶ I.2). After deleting

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3. The nature of Cuadra's work assignment is disputed. For example, Cuadra alleged that he was asked to randomly delete names from the drop-out list, whereas Wichmann and Dambrino both assert that the work assignment had nothing to do with drop-out data. *(See* Doc. No. 80, Ex. 14 (email on October 22, 2002, from Cuadra to Dambrino regarding PEIMS update for special ed, LEP & VOC numbers; *see also* Doc. No. 80, Ex. 1, ¶ 4 (Wichmann Affidavit); Ex. 5, ¶ 3 (Dambrino Affidavit); & Ex. 20-6).

student's names from the drop-out data, Cuadra uploaded the data and then printed the modified drop-out report for Wichmann's meeting the next morning with Stripling. (Doc. No. 34 at 11, ¶ J.2). Cuadra claims that he later accessed AFI screen of the SASI program and, using the screen shots he had printed, restored the names of the students that he had previously deleted.[4]

A few days later, on October 25, 2002, Cuadra claims that Martin, who normally worked on the drop-out data, called him to let him know that she had completed her work on the drop-out data and that it was ready for him to upload into PEIMS. Cuadra uploaded the data to PEIMS, ran the drop-out report and printed a copy of the report for Wichmann. Before giving the report to Wichmann, Cuadra reviewed it and noticed that it reflected no student drop-outs. Cuadra then gave the report to Kimball who questioned the accuracy of the report due to the historically high number of student drop-outs at SHS.

On November 5, 2002, Kimball sent an email to Wichmann to inform her that he did not want to be responsible for the drop-out reports and he objected to working with Martin unless he had the ability to verify the data. In addition, Kimball explained that he noted a discrepancy in the PEIMS report compared to what was coded and that he believed that Martin had coded

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4. The computer log-in information reflects that on October 22, 2002, Cuadra's user identification and password were used to log-in at 19:57 and 20:44; and on October 23, 2002 it reflected he was logged in at 9:35 and 16:33. (Doc. No. 130, Ex. W at Attachment 14a-d).

all students on the report as non-drop-outs. (Doc. N. 130, Ex. W at Attachment 12a-b). Although Wichman was confused by Kimball's email and suggested that they meet to discuss it, she accepted his request to be released from any responsibility for the drop-out reports.

Sometime later, in November 2002, Cuadra claims that Merrie Bonnette, the Principal Intern at SHS, presented him with a document to sign, but he refused to sign it because he believed that by signing the document it would mean that he was acknowledging responsibility for the drop-out data and withdrawal procedures.

On December 18, 2002, HISD Central Administrator Janet Nolte sent a email to Wichmann questioning the zero drop-out number for SHS and suggesting that the school review the data to ensure its accuracy. (Doc. No. 130, Ex. KK). Wichmann, in turn, emailed Dambrino and Martin and requested that they review of the data for its accuracy. On December 19, 2002, Dambrino responded to Wichmann's email by stating that Martin was responsible for the drop-out data; that she had double checked with Martin; and that Martin confirmed to her that she had the documentation to support the report. Thus, on January 27, 2003, despite the red flags and assurances to the contrary, Wichmann verified the State compliance report and, in doing so, confirmed that there were zero drop-outs at SHS. (Doc. No. 130, Ex. W at Attachment 8).

On February 10, 2003, a television news reporter broke the story that SHS had falsely reported that they had zero student drop-outs. (Doc. No. 130, Ex. X). Two

days later, SHS responded to the news story by explaining that any error in the report was merely a clerical error. However, SHS's explanation was called into question when an anonymous HISD worker came forward disputing that the error was a clerical one and informing the media that the school district had already commenced an investigation into who was responsible for the false report. Numerous media reports followed as the investigation into SHS's drop-out data unfolded. In addition, other reports emerged that State investigators had found information suggesting that other Houston schools may have obscured their student drop-out numbers.

HISD requested an investigation be commenced into SHS's drop-out data through its own Department of Professional Standards. (Doc. No. 130, Ex. Y). Billy Aldrich ("Adrich") was assigned to the investigation on or about February 10, 2003 (Doc. No. 130, Ex. Y & SS at 1; Doc. No. 80, Ex. 15 at ¶ 3), and commenced his investigation on February 11, 2003 (Doc. No. 80, Ex. 15 at ¶ 3).

On February 17, 2003, SHS received an email from the district regarding the media's request for records under the Public Information Act ("PIA"). (Doc. No. 130, Ex. W at Attachment 11-a). The next day, SHS administrators Wichmann, Dambrino, Bonnette and Jane Lozano conducted an after-hours search of the administration offices for any information responsive to the request. The search included Cuadra's office and yielded a folder containing drop-out data. The information was immediately turned over to Aldrich.

Appendix C

During the course of his investigation, Aldrich interviewed numerous HISD and SHS employees regarding the alteration of the drop-out data. (Doc. No. 80, Ex. 16; Doc. No. 130, Ex. U). Cuadra was one of the employees Aldrich interviewed. On February 19, 2003, Cuadra met with Billy Aldrich for a recorded interview. (Doc. No. 80, Ex. 8 & Ex. 15 at ¶¶ 4-5). During this interview, Cuadra admitted to Aldrich that he had the ability to change the data, but that he did not do so. Cuadra also denied that anyone had ever asked him to change any such data. The interview was later terminated at Cuadra's request. On April 1, 2003, Cuadra, along with his attorney, once again met with Aldrich. (Doc. No. 80, Ex. 11; Doc. No. 130, Ex. CCC). During this interview, Cuadra did not indicate anyone had ever asked him to change data.

Shortly after the investigation commenced, both Cuadra and Kimball were transferred from SHS to the West District Office. (Doc. No. 80, Ex. 16 at Attachment 5). Thereafter, on or about March 17, 2003, Cuadra initiated a grievance through the Houston Federation of Teachers ("Union") in which he complained that he had been falsely targeted in the investigation and that his work re-assignment was punitive. (Doc. No. 80, Ex. 20-5). As part of the first level grievance process, Cuadra initially met with Anne Patterson ("Patterson") on April 30, 2003. (Doc. No. 80, Ex. 12 & Ex. 15 at ¶ 6). During this meeting, Cuadra claimed that Wichmann and Dambrino directed him to change the leaver codes of 12 to 15 students to reflect that they were not drop-outs. Cuadra stated that he did as they directed, but further claimed that he came in the next morning and changed the data back, thereby

restoring the number of drop-outs back to 30 students. (Doc. No. 80, Ex. 20-6). Cuadra's explanation, which first emerged during this first level grievance process, was forwarded to Aldich because he was still conducting his investigation. Patterson denied Cuadra's grievance. On May 15, 2003, Cuadra requested a level two grievance hearing.

On May 19, 2003, Kimball initiated contact with the District Attorney's office to report, in part, the problems with student drop-out data at SHS. Kimball first telephoned and then later wrote to Lester Blizzard ("Blizzard"), a prosecutor in the Public Integrity Division of the District Attorney's office. (Doc. No. 80, Ex. 26 at ¶ 3 (Blizzard Affidavit); Doc. No. 130, Ex. V). After receiving Kimball's letter, Blizzard contacted HISD and was informed that Aldrich was conducting an investigation into the drop-out incident at SHS. Within a week after receiving Kimball's letter, Blizzard responded by letting him know that he had referred his letter to Aldrich. Blizzard also contacted Aldrich and requested that he provide him with a copy of Aldrich's investigation report when it was completed. (Doc. No. 80, Ex. 26 at ¶ 3). Aldrich concluded his investigation in June 2003 and, as requested, sent Blizzard of a copy of his investigation report. In his report, Aldrich reported that his investigation revealed that Cuadra knowingly changed student leaver codes without authorization. (Doc. No. 80, Ex. 16 at 43).

On June 18, 2003, HISD's Deputy Superintendent Abe Saavedra ("Saavedra"), acting as the Hearing Officer, commenced Cuadra's Level II grievance process;

however, given the public scrutiny and the concern about the perceived impartiality of HISD's own internal investigation, Saavedra, along with HISD General Counsel, Kaye DeWalt ("DeWalt"), determined that the process would be best served by hiring outside counsel to conduct an independent investigation, assess the evidence and offer an opinion concerning the events. HISD hired the law firm of Rusty Hardin and Associates to perform the task. Andy Ramzel and Andy Drumheller, both attorneys at Hardin's firm, commenced the investigation. Following their investigation, the attorneys submitted their report and conclusions (hereinafter, "Hardin report") to Saavedra and DeWalt on August 28, 2003. In their report, the attorneys concluded, in relevant part, that "[t]he allegation that on Tuesday, 12/22/2002 and/or Wednesday, 10/23/2002, Kenneth Cuadra knowingly changed the student leaver codes of 30 students listed on the PEIMS EDIT + Dropout Report to the Texas Education Agency, and he was not authorized to do so is ***CONFIRMED***." (Doc. No. 80, Ex. 16 at 51 & Ex. 20; Doc. No. 130, Ex. W).

On August 29, 2003, after reviewing the Hardin report along with the other documentation provided, Saavedra issued his written decision pertaining to the student drop-out matter. In his decision, Saavedra denied the relief sought in Cuadra's grievance.[5] Saavedra also recommended that the Hardin report be referred to the District Attorney's office for a determination of whether

5. In addition to Cuadra, others, including several of the Defendants, were disciplined for the incident regarding the drop-out data. However, as alleged by Cuadra, none were criminally charged for their conduct.

any laws were violated by any person. Finally, given the significant publicity surrounding the events, HISD made the decision to make the Hardin report available to the public—a decision that prompted Cuadra to file another grievance in which he alleged that the release of the Hardin report violated his privacy rights and was merely done in an effort to retaliate against him. This grievance was heard by Assistant Superintendent Bill Carpenter, but it was ultimately denied. (Doc. No. 34 at 33, ¶ D.6).

After his grievances and administrative appeals were denied, Cuadra was re-assigned from his temporary assignment in the West District administrative offices to the HISD Bus Barn. Cuadra filed a grievance concerning this re-assignment, but he did not prevail. In August 2004, Cuadra resigned from his job with HISD. (Doc. No. 130, Ex. G at 465:11-19 (Cuadra Deposition)).

On October 7, 2005, Tess Buess ("Buess"), an Assistant District Attorney in the Public Integrity Division of the Harris County District Attorney's office, sought and obtained a criminal indictment against Cuadra for making a false alteration to a government record-- namely, a public school record. (Doc. No. 80, Ex. 24 at ¶ 9). Following his indictment, Cuadra was arrested and released on bond. (Doc. No. 34 at 35, ¶ M.6; Doc. No. 80, Ex. 24 at ¶ 9). Matt Hennessy ("Hennessy") with the firm of DeGuerin, Dickson & Hennessy was ultimately retained to represent Cuadra in the criminal proceeding.[6] Cuadra's attorney filed a motion to quash and the October indictment was

6. Prior to retaining Matt Hennessy, Cuadra was represented at different times by two other criminal defense attorneys. (Doc. No. 130, Ex. E at 165:14-25; 166:1-22).

dismissed as deficient,[7] however, another grand jury subsequently re-indicted Cuadra on May 25, 2006. (Doc. No. 80, Ex. 24 at ¶ 10; Doc. No. 130, Ex. E at 161:11-13 (Buess Deposition).

During the six months that followed his re-indictment, prosecutor Buess had several meetings with Cuadra's criminal defense attorney to discuss his theory of the case and defenses. Following these discussions, Buess concluded that the State might have difficulty establishing Cuadra's guilt beyond reasonable doubt because the time line of events revealed a gap in the evidence that could not be disproved by computer records. On this basis, Buess made the decision to dismiss the indictment against Cuadra on November 1, 2006, and a press release was issued that same day. (Doc. No. 80, Ex. 24 at ¶ 15; Doc. No. 130, Ex. T). Aldrich called Buess' office on November 1, 2006, to inquire about a trial date, but he was informed that the District Attorney's office had just dismissed the charges against Cuadra. (Doc. No. 80, Ex. 15 at ¶ 12).

On October 1, 2007, Cuadra filed his original complaint in federal court alleging constitutional claims against Defendants. (Doc. No.1). Cuadra later amended his complaint. (Doc. No. 34). On March 13, 2009, Defendants moved for summary judgment on all Cuadra's claims. (Doc. No. 80). Cuadra then moved for partial summary judgment on his First and Fourteenth Amendment claims. (Doc. No. 87). These motions are now ripe for adjudication.

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7. The motion to quash was granted because the indictment failed to adequately track the statute and required more specific allegations. (Doc. No. 80, Ex. 24 at ¶ 10 (Buess Affidavit).

Appendix C

II. APPLICABLE LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). A fact is "material" if its resolution in favor of one party might affect the outcome of the suit under governing law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see also United States v. Arron*, 954 F.2d 249, 251 (5th Cir. 1992). "An issue is genuine if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party." *Cooper Tire & Rubber Co. v. Farese*, 423 F.3d 446, 454 (5th Cir. 2005).

Under Rule 56(c), the moving party bears the initial burden of informing the court of the basis for its belief that there is an absence of a genuine issue for trial and of identifying those portions of the record that demonstrate such an absence. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 576, 586-87 (1986); *see also, Burge v. Parish of St. Tammany*, 187 F.3d 452, 464 (5th Cir. 1999). Where the moving party meets its initial burden under Rule 56(c), the burden then shifts to the nonmovant to show a genuine issue of material fact exists that precludes summary judgment. "[T]he nonmoving party must come forward 'with specific facts showing that there is a *genuine issue for trial.*'" *Matsushita*, 475 U.S. at 586-87 (quoting Fed. R. Civ. P. 56(e)) (emphasis in original); *see also, Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). To sustain the burden, the nonmoving party must produce

evidence admissible at trial. *See Anderson*, 477 U.S. at 242; *see also, Thomas v. Price*, 975 F.2d 231,235 (5th Cir. 1992)("To avoid summary judgment, the nonmoving party must adduce evidence which creates a fact issue.").

At the summary judgment stage, the court views the facts in a light most favorable to the nonmoving party and draws all reasonable inferences in favor of the nonmovant, but only when "there is a 'genuine' dispute as to those facts." *Scott v. Harris*, 550 U.S. 372, 127 S.Ct. 1769, 1776, 167 L.Ed.2d 686 (2007); *see also Goodson v. City of Corpus Christi*, 202 F.3d 730, 735 (5th Cir. 2000) ("[T]he nonmoving party may not rest on the mere allegations or denials of its pleadings, but must respond by setting forth specific facts indicating a genuine issue for trial."). "[A] nonmovant cannot overcome summary judgment with conclusory allegations and unsubstantiated assertions." *Mace v. City of Palestine*, 333 F.3d 621, 624 n. 7 (5th Cir. 2003); *see also Johnston v. City of Houston, Tex.*, 14 F.3d 1056, 1060 (5th Cir. 1994) ("only evidence-not argument, not facts in the complaint-will satisfy the burden."). Nor can the nonmovant overcome summary judgment by showing "some metaphysical doubt as to the material facts" in an attempt to create a genuine dispute. *Matsushita*, 475 U.S. at 584-86.

Appendix C

III. DISCUSION

A. Qualified Immunity

Initially, Defendants assert that they are entitled to qualified immunity based on the § 1983 claims Cuadra brings against them in their individual capacity. When a § 1983 claim is alleged against a defendant in his individual capacity, it is subject to the affirmative defense of qualified immunity. Under the doctrine of qualified immunity, an official sued in his individual capacity is protected from not only from liability, but also from having to stand trial. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Spann v. Rainey*, 987 F.2d 1110, 1114 (5th Cir.1993). Further, once a defendant "invokes qualified immunity, the burden is on the plaintiff to demonstrate the inapplicability of the defense." *McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir. 2002).

In determining whether a defendant is entitled to qualified immunity, the court engages in a two-pronged analysis. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). First, the court must determine whether a "constitutional right would have been violated on the facts alleged." *Flores v. City of Palacios*, 381 F.3d 391,395 (5th Cir. 2004). Second, the court must determine whether "the defendant's actions violated clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* Courts are instructed "to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson v. Callahan*, _ U.S._, 129 S. Ct. 808, 172 L.Ed.2d 565 (2009).

Appendix C

B. Fourth Amendment Claims

1. *Malicious Prosecution*

Defendants move for summary judgment on Cuadra's claims that Defendants procured a criminal prosecution against him in violation of his Fourth Amendment rights. (Doc. No. 34 at 44-46). The Fifth Circuit has determined that "'malicious prosecution' standing alone is no violation of the United States Constitution, and that to proceed under 42 U.S.C. § 1983 such a claim must rest upon a denial of rights secured under federal and not state law." *Castellano v. Fragozo*, 352 F.3d 939, 942 (5th Cir. 2003). In other words, there is no "freestanding constitutional right to be free from malicious prosecution." *Id.* at 945. Thus, any allegation of malicious prosecution fails to state a claim upon which relief can be granted under 42 U.S.C. § 1983. *Id.*

Nevertheless, even prior to *Castellano*, when the Fifth Circuit recognized a "constitutional right to be free from bad faith or malicious prosecutions," it did so only when "all of its common law elements [we]re established." *See Izen v. Catalina*, 256 F.3d 324, 327-28 (5th Cir. 2001); *Goodson v. City of Corpus Christi*, 202 F.3d at 740 (quoting *Sanders v. English*, 950 F.2d 1152, 1163 (5th Cir. 1992)). To prevail on a malicious prosecution claim under § 1983, a plaintiff would be required to establish that (1) a criminal action was commenced against him, (2) the prosecution was caused or aided by the defendant, (3) the action terminated in the plaintiff's favor, (4) the plaintiff was innocent, (5) the defendant acted without probable cause,

(6) the defendant acted with malice, and (7) the criminal proceeding damaged the plaintiff. *See Izen*, 256 F.3d at 328; *Goodson*, 202 F.3d at 740-41; *Rodriguez v. Rutter*, 310 Fed. Appx. 623, 628 (5th Cir. 2009).

To obtain summary judgment, a defendant need only negate one element of the cause of action raised by a plaintiff. In the present case, Defendants maintain that they are entitled to summary judgment because several essential elements of this cause of action are lacking. The Court will address each in turn.

a. ***Initiate or Procure Criminal Prosecution***

Defendants maintain that the undisputed evidence does not support the second element of malicious prosecution which requires Caudra to establish that the Defendants caused or aided the criminal proceedings against him. To establish this element, a plaintiff must show that the defendant either initiated or procured the criminal prosecution. *Browning-Ferris Industries, Inc. v. Lieck*, 881 S.W.2d 288, 292-93 (Tex. 1994). In *Browning-Ferris*, the Court explained:

> A person initiates a criminal prosecution if he makes a formal charge to law enforcement authorities. A person procures a criminal prosecution if his actions are enough to cause the prosecution, and but for his actions the prosecution would not have occurred. In other words, procurement requires that a person's

> actions be both a necessary and a sufficient cause of the criminal prosecution. Thus, a person cannot procure a criminal prosecution when the decision whether to prosecute is left to the discretion of another person, a law enforcement official or the grand jury. An exception ... occurs when a person provides information which he knows is false to another to cause a criminal prosecution.

Id. at 292 [internal citations omitted] (citing to RESTATEMENT (SECOND) OF TORTS § 653 (1977)). A person will not be subjected to liability for malicious prosecution by "merely aiding or cooperating in causing a criminal prosecution." *Id.* Rather "a person's actions must be the cause in fact of a criminal prosecution before he can be liable for malicious prosecution." *Id.*

Cuadra contends that the Defendants initiated the prosecution against him. Cuadra's claims are not supported by the evidence. The record clearly shows that none of the Defendants signed or submitted a criminal complaint against him. While Cuadra points to the HISD's investigation, as urged by Defendants, merely referring the Court to the initiation of an internal workplace investigation will not suffice to satisfy this element. (Doc. No. 130, Ex. BB). In addition, Cuadra also points to Abe Saavedra's recommendation that the Hardin report be sent to the District Attorney's office, however, this too does little to establish this element. At best, it shows Saavedra, who was not named as a defendant, recommended that the Hardin report be sent to the District Attorney's office

so that it could exercise its independent judgment and determine if any crimes were committed by anyone in this matter. Unfortunately for Cuadra, despite his contentions to the contrary, the evidence simply does not reflect that any of the Defendants took any steps to initiate Cuadra's prosecution. (Doc. No. 130, Ex. E at p. 17-23). Instead, it merely reflects that Defendants cooperated, when requested, with the District Attorney's office, which is insufficient to subject them to liability. *Browning-Ferris*, 881 S.W.2d at 292.

Cuadra also claims that Defendants procured the prosecution against him through their prodding contacts with the District Attorney. In an attempt to support this allegation, Cuadra points to a log of the numerous telephone calls between Aldrich and the prosecutor, Buess. Initially, the record is devoid of evidence that any of the Defendants, aside from Aldrich, had any contact whatsoever with the District Attorney's office after Caudra resigned. Further, with regard to Aldrich, while the telephone log does reflect numerous calls between Buess and Aldrich, all of these calls, save one, were initiated by Buess. (Doc. No. 130, Ex. U). The undisputed evidence reflects that the ***only*** call initiated by Aldrich to Buess was the one Aldrich made in November 2006, when he learned the case had been dismissed. Once again, the law will not subject Aldrich to liability for merely cooperating with the District Attorney's office. *Browning-Ferris*, 881 S.W.2d at 292.

Finally, any argument by Cuadra that Defendants procured the criminal prosecution against him by failing

to provide Buess with the "smoking gun" document (*See* Doc. No. 80 at 10 n. 9), would not suffice to show that Defendants' actions were either the necessary or sufficient cause of the criminal prosecution against him. Nevertheless, the evidence clearly reflects Buess had the document Cuadra refers to as the "smoking gun," but that she did not consider it relevant to her determination on whether to seek the indictment. (Doc. No. 130, Ex. E at 175:14-25; 175-176; *see also,* Doc. No. 130, Ex. UU). *Cf. King v. Graham*, 126 S.W.3d 75, 78 (Tex. 2003) ("a person who knowingly provides false information to the grand jury or a law enforcement official who has the discretion to decide whether to prosecute a criminal violation cannot be said to have caused the criminal prosecution if the information was immaterial to the decision to prosecute.").

b. *Probable Cause*

Defendants also maintain that Cuadra has failed to establish that the criminal proceeding was commenced without probable cause. Probable cause in this context means "the existence of such facts and circumstances as would excite the belief, in a reasonable mind, acting on facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted." *Moore v. McDonald*, 30 F.3d 616, 620 n. 2 (5th Cir.1994). The existence of probable cause is an absolute bar to maintaining an action for malicious prosecution under the Fourth Amendment. *See Kerr v. Lyford*, 171 F.3d 330, 341-42 (5th Cir. 1999) *overruled on other grounds, Roche v. John Hancock Mut. Life Ins. Co.*, 81 F.3d 249, 256 n. 5 (1st Cir.1996); *Biddle v. Martin*, 992 F.2d

673, 678 (7th Cir.1993). To the extent the facts underlying the probable cause determination are undisputed, the court may resolve the issue as a matter of law. *See Kerr*, 171 F.3d at 340; *Blackwell v. Barton*, 34 F.3d 298, 305 (5th Cir. 1994). To defeat summary judgment, the plaintiff "must demonstrate that either (1) the record affirmatively establishes that probable cause was lacking or (2) enough genuine, material factual disputes exist regarding the elements of probable cause that the ultimate finding of probable cause is the subject of a genuine, material factual dispute." *Kerr*, 171 F.3d at 340.

The return of an indictment by a grand jury generally establishes probable cause to believe that the accused committed the offense charged. *See Campbell v. City of San Antonio*, 43 F.3d 973, 976 (5th Cir. 1995); *United States v. Garcia*, 27 F.3d 1009, 1014 (5th Cir.1994). As the Supreme Court has noted:

> [t]he grand jury's historic functions survive to this day. Its responsibilities continue to include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions.

United States v. Calandra, 414 U.S. 338, 343 (1974) (citing *Branzburg v. Hayes*, 408 U.S. 665, 686-87 (1972)). "'[T]he grand jury's determination that probable cause exist[s] for the indictment also establishes that element for the purpose of issuing a warrant for the apprehension of the person charged.'" *Campbell*, 43 F.3d at 976 (quoting

Giordenello, 357 U.S. at 487, 78 S. Ct. 1245). Nevertheless, it has been acknowledged that "simply obtaining an indictment is not enough to insulate state actors from an action for malicious prosecution under § 1983." *Hand v. Gary*, 838 F.2d 1420, 1426 (5th Cir. 1988). "The probable cause for the indictment must not be tainted by malicious actions" of government officials. *Cornett v. Longois*, 871 F.Supp. 918, 922 (E.D.Tex.1994) (citing *Hand*, 838 F.2d at 1426). In the absence of evidence that material facts were withheld or that the deliberations of the grand jury or other intermediary were otherwise tainted by the actions of the defendant, however, no liability for malicious prosecution can attach. *See Taylor v. Gregg*, 36 F.3d 453, 457 (5th Cir. 1994); *Hand*, 838 F.2d at 1428.

In the present case, the evidence reflects that Aldrich sent his report to the District Attorney's office only after Blizzard, the lead prosecutor for the Public Integrity Division of the District Attorney's office, requested it. (Doc. No. 80, Ex. 26 at ¶ 3; Doc. No. 130, Ex. V). Thereafter, Buess, who replaced Blizzard as the lead prosecutor in the Public Integrity Division, reviewed the file and talked to potential witnesses before exercising her discretion in deciding to present the information to a grand jury. The evidence clearly reflects that the decision to seek the indictment was made by Buess (Doc. No. 130, Ex. E at 183:6-10), without influence by any of the Defendants (Doc. No. 130, Ex. E at 189:4-23), and it was based on her assessment that probable cause existed to do so. (Doc. No. 130, Ex. E at 191:17-25, 192:1-6; 198:23-25 & 199: 1-12); *see Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (emphasizing that "so long as the prosecutor

has probable cause," the charging decision is generally discretionary). Buess was not aware of any evidence that was not made available to her by Defendants. (Doc. No. 130, Ex. E at p. 191: 15-19). The evidence further reflects that the grand jury twice made the decision that probable cause existed to indict Cuadra. (Doc. No. 130, Ex. E at 192:20-25; 193:1-16).

However, Caudra maintains that Buess' determination that there was probable cause to seek an indictment, as well as the grand juries' decisions to indict him, were tainted because the Defendants misled and did not tell the truth to either Aldrich or to the Hardin attorneys during their investigations. In addition, Cuadra maintains that Aldrich's failure to disclose the "smoking gun" to the prosecutor tainted the grand jury proceedings. Setting aside his speculation and his conclusory allegations, the undisputed evidence does not support Cuadra's allegations. First, the evidence does not support that any Defendant physically altered or destroyed evidence. Second, the evidence does not support that any of the Defendants knowingly suppressed any evidence from the prosecutor. (Doc. No. 130, Ex. E at 93:1-15; 206:8-17; 236-237). Third, the evidence reflects that the prosecutor, Buess, clearly and unequivocally testified that she had the document to which Cuadra refers as the "smoking gun" (Doc. No. 130, Ex. E at 175:14-25; 175-176; *see also,* Doc. No. 130, Ex. UU), but did not consider it significant in the case. Fourth, contrary to Cuadra's contentions, the District Attorney testified that she had no evidence, nor has any evidence ever been produced, that the handwriting on the "smoking gun" document was, in fact, Martin's handwriting. (Doc.

No. 130, Ex. E at 125:8-25). Finally, the evidence does not support Cuadra's contentions that the grand jury was tainted by Defendants because there is no showing that any of them testified in front of the grand jury. (Doc. No. 130, Ex. E at 224:6-25 & 225:1-10).

c. *Favorable Termination*

Defendants maintain that Cuadra has not shown, and the evidence does not support, that the underlying criminal action terminated in his favor. The Court cannot agree. Favorable termination of the criminal proceeding is an essential element of § 1983 malicious prosecution claim. *Brummett v. Camble,* 946 F.2d 1178, 1183-84 (5th Cir. 1991). The termination of a criminal proceedings due to a plea bargain is not considered a favorable termination. *Taylor,* 36 F.3d at 455-56. However, the instant case does not involve those circumstances. Rather, the undisputed facts shows that the prosecutor made the affirmative decision to dismiss the criminal charges against Cuadra. Where the criminal charges against a plaintiff were dropped based on the prosecutor's affirmative decision not to prosecute, the Fifth Circuit has determined that this amounts to a favorable termination. *Izen,* 256 F.3d at 328.

d. *Innocence*

Defendants maintain that Cuadra has not shown that he is innocent. An essential element of a § 1983 malicious prosecution is the plaintiffs innocence. Unlike a criminal proceeding, when asserting a claim for malicious prosecution, there is no presumption that the plaintiff

was innocent of the underlying claim. *Sutton v. United States*, 234 F.3d 30 at *1 (5th Cir. 2000). Cuadra alleges that evidence existed which, if taken together, establishes his innocence of any wrongdoing, but the undisputed evidence reflects that Cuadra admitted to both Kimball and then later to Aldrich that he had, in fact, changed the data. (Doc. No. 13, Ex. Z). While Cuadra claims to have changed the data back, there is no evidence that he did so. Thus, even viewing the evidence in a light most favorable to Cuadra, the evidence offered by Cuadra merely calls into question whether the State would have been able to prove, beyond a reasonable doubt, that he was guilty of the crime for which he was indicted; however, considering all the evidence, it does not prove his innocence.

2. ***False Arrest***

Cuadra alleges that he was unlawfully "arrested, forced to make bond for his freedom, suffered restrictive movement and associations ..." (Doc. No. 34 (Pl's Second Am. Compl.) at 43-44, ¶ 2). Defendants maintain that Cuadra has failed to establish his claim for false arrest. Defendants also maintain that they are entitled to qualified immunity.

The Fourth Amendment bestows the constitutional right upon a person to be free from unreasonable seizures of both his person and effects. CONST. AMEND. IV; *see also, Sorenson v. Ferrie*, 134 F.3d 325, 328 (5th Cir. 1998). Violation of this right may be grounds for suit under 42 U.S. § 1983. *Sorenson*, 134 F.3d at 328. In order to establish a Fourth Amendment claim for false

arrest under Section 1983, a plaintiff must establish the state common law elements of false arrest, as well as the deprivation of a constitutional right. The state common law elements require a plaintiff to show that there was a (1) willful detention, (2) it was without consent, and (3) without authority of law. *Casanova v. City of Brookshire*, 119 F.Supp.2d 639, 651(S.D. Tex. 2000).

"If there was probable cause for the arrest, a claim for false arrest is not viable." *Casanova*, 119 F. Supp. 2d at 651. The Fifth Circuit has held that a grand jury's determination that probable cause exists to issue an indictment also establishes probable cause for issuing the warrant to arrest the person charged. *Rodriguez v. Ritchey*, 556 F.2d 1185, 1190-91 (5th Cir. 1977); *see also, Campbell*, 43 F.3d at 976. Here, there is no dispute that Cuadra was arrested pursuant to a facially valid arrest warrant that was issued ***after*** a grand jury determined probable cause existed to issue an indictment against him. (Doc. No. 80, Ex. 24).

Cuadra nevertheless contends that probable cause was lacking because he is innocent. Unfortunately, as explained by the Supreme Court, "[t]he Constitution does not guarantee that only the guilty will be arrested. If it did, § 1983 would provide a cause of action for every defendant acquitted-indeed, for every suspect released." *See Baker v. McCollan*, 443 U.S. 137, 145 (1979); *see also, Casanova*, 119 F.Supp.2d at 652 (recognizing that "a warrant is valid even though the court, through lack of information or otherwise, has issued it for the arrest of a

person in fact innocent of the offense alleged."). Moreover, the Fifth Circuit has explained that "[w]hether the crime actually occurred or whether a suspect is eventually convicted is irrelevant to the probable cause analysis." *Morris v. Dillard Dep't Stores, Inc.*, 277 F.3d 743, 754 n. 10 (5th Cir. 2001).

Cuadra also contends that probable cause is lacking because Defendants failed to provide the District Attorney with the document he describes as the "smoking gun." However, for the same reasons previously discussed, Cuadra's arguments are unavailing.

In conclusion, because no genuine issues of material fact exist upon which a jury could conclude that Defendants either maliciously prosecuted or falsely arrested Cuadra in violation of his Fourth Amendment rights, Defendants are entitled to summary judgment on these claims as a matter of law. Further, since Cuadra cannot establish a constitutional violation, Defendants are entitled to qualified immunity on these causes of action.

C. First Amendment Claims

Cuadra alleges that Defendants violated his First Amendment rights. In particular, Cuadra claims that Defendants retaliated against him after he exercised his right to free speech, between October 22, 2002 and September 2003, on various matters related to the student drop-out report and after he exercised his right to free speech by filing grievances against HISD employees.

Appendix C

(Doc. No. 34 (Second Am. Compl.) pp. 39-42, ¶¶ a.i-x; pp. 42-43, ¶¶ c, d & e).[8]

Initially, Defendants maintain that, with regard to the internal investigation concerning the student dropouts during the 2002-2003 school year, his re-assignments, and ultimate resignation, Cuadra's claims of First Amendment violations are time barred. The Court agrees. To the extent Cuadra alleges that, after the exercise of his right to free speech in 2002 or 2003, Defendants retaliated against him either in the course of the internal investigation or during the grievance process, or by re-assigning him, which prompted his resignation in August 2004, these claims would be time barred because Cuadra "knew or had reason to know about" this alleged retaliation in 2003, or by the latest August 2004 when he resigned, yet he failed to bring this action until more than three years later on October 7, 2007.[9]

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8. Insofar as Cuadra attempts to assert new claims in his Response (*e.g.*, Defendants infringed on his "associational rights and references") that are not alleged in his Second Amended Complaint, Defendants have objected to any such attempt. (Doc. No. 134 at 15). Defendants' objections are sustained. *Tucker v. Union of Needletrades Industrial*, 704 F.3d 784, 788 (6th Cir. 2005) ("[a] non-moving party plaintiff may not raise a new legal claim for the first time in a response to the opposing party's summary judgment motion."); *see also, Fisher v. Metropolitan Life Ins. Co.*, 895 F.2d 1073, 1078 (5th Cir. 1990) (same).

9. Even assuming Cuadra were to suggest that the statute of limitations on this aspect of his First Amendment retaliation claim would not have commenced until the criminal case against him was dismissed, his position would find no support in the law.

Notwithstanding, Cuadra also alleges that, based on his "exercise of free speech," Defendants retaliated against him by pursuing a criminal prosecution against him. This claim would not be time barred. *See Casanova*, 119 F.Supp.2d at 650 (claim for malicious prosecution does not accrue until criminal action terminated in favor of defendant). Both Cuadra and Defendants have moved for summary judgment on the First Amendment retaliatory prosecution claim. (Doc. No. 80 at 32-35; Doc. No. 87 at 63-71).

The Fifth Circuit recognizes a First Amendment claim under § 1983 for retaliatory criminal prosecution. *Izen*, 398 F.3d at 367. In order to establish a claim for retaliatory criminal prosecution, a plaintiff must establish (1) he was engaged in constitutionally protected activity; (2) the defendants' actions caused him to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and (3) the defendants' adverse actions were substantially motivated against the plaintiff's exercise of constitutionally protected conduct. *Keenan v. Tejeda*, 290 F.3d 252, 258 (5th Cir. 2002). In addition, a plaintiff must establish each of the common law elements of malicious prosecution. *Izen*, 398 F.3d at 367; *Johnson v. La. Dep't of Agriculture*, 18 F.3d 318, 320 (5th Cir. 1994).

Cf. Wallace v. Kato, 549 U.S. 384, 389-92 (2007) (Fourth Amendment claim for unlawful arrest, even where the arrest is followed by criminal proceedings, accrued at the time the person is detained pursuant to legal process rather than the termination of the malicious prosecution case).

Appendix C

Defendants maintain that Cuadra's claim fails because he cannot establish the elements for malicious prosecution, nor can he prove causation. The Court agrees with Defendants. Cuadra has not established his First Amendment retaliation claim as a matter of law because, as discussed above, he cannot establish each of the elements required for a malicious prosecution claim. In addition, Cuadra cannot establish causation because his indictment and prosecution were not based upon decisions of Defendants, but upon the decisions of the prosecutor and the grand juries-independent intermediaries. Accordingly, Cuadra's First Amendment retaliation claims fail. Insofar as Cuadra cannot establish a constitutional violation, Defendant are also entitled to qualified immunity.

D. Fourteenth Amendment Claims

1. *Deprivation of Liberty and Property Interest*

Cuadra alleges that Defendants deprived him of various protected liberty and property interests in violation of the Fourteenth Amendment. In particular, Cuadra's claims that Defendants deprived him of his *liberty interests* in violation of due process consist of the following: (1) his "Due Process Civil Conspiracy" claim[10];

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10. Cuadra alleges Defendants engaged in unconstitutional, arbitrary and capricious conduct (a substantial due process claim) by actingjointly and or severally in civil conspiracy to initiate and/or conduct and/or falsely claim that Cuadra had altered the dropout numbers and/or report of SHS when they had evidence of, knew, or should have known that Martin acting under Dambrino's

(2) his "Due Process Employment Discipline" claim[11]; (3) his "Due Process Free Speech" claim[12]; and (4) his "Due Process False Evidence" claim.[13] (Doc. No. 80 at 45 of 73). Cuadra's claims that Defendants deprived him of *property interests* relate to his interest in not being subjected to retaliation for grieving his supervisor's actions (Doc. No. 34 at 48, ¶ a.(2).ii) and his re-assignment, denial of scheduled promotion, denial of regular salary increases, demotion, and constructive discharge in August 2004. (Doc. No. 34 at 47-49, ¶ a.(2).iii). Finally, Cuadra alleges that Defendants violated his right to Equal Protection by depriving him of his "exercise of fundamental rights to free speech and expression." (Doc. No. 34 at 49, ¶ b). Both Defendants and Cuadra move for summary judgment

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supervision had been the person who had altered the drop-out records to produce the zero data on October 25, 2002. (Doc. No. 34 at 46-47, ¶ a.(1)).

11. Caudra alleges Defendants unconstitutionally deprived him of his right to be free from employment discipline by the initiation of or procurement of a criminal prosecution in the absence of personal guilt based on known false evidence. (Doc. No. 34 at 46-47, ¶ a.(1)).

12. Cuadra alleges Defendants unconstitutionally deprived him of his right to speak to anyone on any matter under the Texas Constitution. (Doc. No. 34 at 46-47, ¶ a.(1)).

13. Cuadra alleges Defendants unconstitutionally deprived him of his right to be free from having his employment or reputation conditioned on his willingness or refusal to wrongly take responsibility for an illegal act, verify a false statement, or lie to assist HISD or his supervisors in protecting themselves or other administrators from official or public responsibility for altering drop out records. (Doc. No. 34 at 46-47, ¶ a.(1)).

on the claim that Cuadra was deprived of his protected liberty interests under the Fourteenth Amendment. (Doc. No. 80 at 35-43; Doc. No. 87 at 54-63).

Defendants argue that Cuadra's claims, which include his Employment Discipline claim, his Due Process Employee Free Speech claim, his Due Process Employment Condition claim, his Due Process District Policy claim, his Due Process Constructive Discharge claim, and his Equal Protection claim are time-barred because they are all based on actions that occurred before August of 2004, when Cuadra was still employed with HISD, and Cuadra either knew or had reason to know of them when he resigned in August 2004. The Court agrees. Cuadra, having failed to present these claims until filing this lawsuit on October 7, 2007, is now time-barred from pursuing them. (Doc. No. 80 at 46-47 of 73).

Furthermore, even assuming that Cuadra's remaining "liberty interest" and substantive due process claims are based on his indictment, arrest or prosecution, Defendants are correct in their position[14] that these Fourteenth Amendment claims are foreclosed by the Supreme Court's decision in *Albright v. Oliver*, 510 U.S. 266, 268 (1992). In *Albright*, the Court held that when an individual is charged and arrested without probable cause, but makes no claim that his procedural due process rights have been violated, his claim, if any, is under the Fourth Amendment. There is no Fourteenth Amendment "liberty interest" or substantive due process right to be free from criminal

14. Doc. No. 80 at 47 of 73.

prosecution unsupported by probable cause. *See id.* at 269-71. In the present case, Cuadra does not allege, nor could he establish based on this record, that he was deprived of procedural due process rights in the course of the criminal proceeding. Furthermore, Defendants could not have caused any such deprivation because they clearly had no control over the criminal proceeding. Cuadra's claims are not cognizable under the Fourteenth Amendment.

2. ***Equal Protection***

Cuadra claims that Defendants violated his right to Equal Protection by depriving him of his "exercise of fundamental rights to free speech and expression." (Doc. No. 34 at 49, ¶ b.). Notably, Cuadra does not allege that he was discriminated against because he was a member of an identifiable class *(i.e.,* race, sex or national origin), rather Cuadra appears to suggest under a "class-of-one" theory that he was treated differently than other HISD employees for arbitrary, vindictive and malicious reasons. To the extent this claim is not time-barred, Defendants move for summary judgment on Cuadra's Equal Protection claim based on the Supreme Court's holding in *Engquist v. Oregon Department of Agriculture,* 553 U.S._, 128 S.Ct. 2146, 2155, 170 L.Ed.2d 975 (2008).

In *Engquist,* the Supreme Court clarified that, while the "Equal Protection Clause is implicated when the government makes class-based decisions in the employment context, treating distinct groups of individuals categorically differently, . . . we have never found the Equal Protection Clause implicated in the specific circumstances

where, as here, government employers are alleged to have made an individualized, subjective personnel decision in a seemingly arbitrary or irrational manner." *Engquist*, 128 S.Ct. at 2155 [internal citations omitted]. The Court went on to state:

> ratifying a class-of-one theory of equal protection in the context of public employment would impermissibly 'constitutionalize the employee grievance.' [citation omitted]. The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. [citation omitted]. Public employees typically have a variety of protections from just the sort of personnel actions about which Engquist complains, but the Equal Protection Clause is not one of them.

Id. at 2157. Thus, based on the holding in *Engquist*, this Court concludes Cuadra's Equal Protection claim fails as a matter of law.

E. Conspiracy Claim

Cuadra alleges that Defendants conspired to deprive him of his Fourth Amendment rights by falsely claiming that he altered student drop-out data in October of 2002, by remaining silent to protect themselves from criminal prosecution, and by procuring the criminal prosecution against him. (Doc. No. 34 at 45-46). Cuadra also alleges that Defendants conspired to deprive him of his First

Amendment rights by maliciously and falsely suppressing evidence, shifting the blame to him, and refusing to take action which could have prevented his indictment, arrest, and criminal prosecution. (Doc. No. 34 (Pl's Second Am. Compl) at 43-44, §§ f-h; *see also,* Doc. No. 34 at 46, ¶ 4(a)(1)(i) concerning his Fourteenth Amendment claims).

Defendants have moved for summary judgment on Cuadra's conspiracy claims based on the intra-corporate conspiracy doctrine. It is true that the Fifth Circuit has determined that a single legal entity, such as HISD and its employees, "is incapable of conspiring with itself" for purposes of the intra-corporate conspiracy doctrine. *Hilliard v. Ferguson,* 30 F. 3d 649, 653 (5th Cir. 1994); *see also, Hankins v. Dallas Independent School District,* 698 F.Supp. 1323, 1330 (N.D.Tex.1988) (claims under § 1985(3) for conspiracy cannot stand when the plaintiff teacher sues a school and its officials because a school and its officials constitute a single legal entity which cannot conspire with itself); *Zentgraf v. Texas A & M University,* 492 F.Supp. 265, 272-273 (S.D.Tex.1980) (University and officials constitute single legal entity which cannot conspire with itself). However, the intra-corporate conspiracy doctrine does not apply where the corporation conspires with a third-party. *See Applied Capital Inc. v. Gibson,* 558 F.Supp.2d 1189, 1199 (D. NM 2007); *Zic v. Italian Gov't Travel Office,* 130 F.Supp.2d 991, 997 (N.D. Ill. 2001) (citing *Mehl v. Navistar Int'l Corp.,* 670 F.Supp. 239, 241 (N.D. Ill. 1987)).

In the present case, Cuadra's claims of conspiracy are not limited to HISD and its employees, but also include

Defendant Rusty Hardin. Defendants nevertheless maintain that the intra-corporate conspiracy doctrine still applies because Hardin has been dismissed from the case. Defendants refer the Court to no authority in support of their position. While the Court is not entirely convinced by Defendants' argument (Cf. *Dennis v. Sparks*, 449 U.S. 24, 27 (1980) (dismissal of judge as a defendant based on judicial immunity did not negate conspiracy claim)), it need not resolve the issue because Hardin[15] will not be considered a third-party for purposes of the doctrine. *See General Refractories Co. v. Fireman's Fund Ins. Co.*, 337 F.3d 297,313-14 (3rd Cir. 2003) (absent a showing that attorney acted for personal reasons, an insured's claim that insurer's attorney conspired with the insurer to abuse process under the law was barred by intracorporate conspiracy doctrine).

Notwithstanding, Defendants maintain that, even to the extent that Cuadra could state a claim that the defendants, in their individual capacities, conspired to violate his rights,[16] his claim fails as a matter of law

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15. The evidence reflects that the attorneys at Hardin's firm considered HISD their client insofar as they asserted the attorney-client privilege to their communications and billed HISD approximately $58,000.00 in legal fees for the work they performed. *(See* Doc. No. 130, Ex. J (Andy Drumheller Deposition); Ex. GGG).

16. *See ASARCO LLC v. Americas Min. Corp.*, 382 B.R. 49, 82 n. 30 (S.D. Tex. 2007) (recognizing that an actionable claim might exist where defendants act for their own personal benefits, as opposed to the benefit of the entity); *Nelson v. Fontenot*, 784

because he cannot prove the requisite elements of a conspiracy claim and, by failing to establish an actual deprivation of his constitutional rights, Defendants are entitled to qualified immunity. (Doc. No. 80 at 61-61 of 73). The Court agrees.

In order to establish a *prima facie* case for conspiracy under § 1983, a plaintiff must demonstrate (1) an agreement between persons acting under color of law to commit an illegal act, and (2) an actual deprivation of the plaintiff's constitutional rights in furtherance of the conspiracy. *Hale v. Townley*, 45 F.3d 914, 920 (5th Cir. 1995). To succeed, the plaintiff must plead specific facts that, if proved, would establish the elements of the claim. *Marts v. Hines*, 68 F.3d 134, 136 (5th Cir. 1995). It is true that an agreement may be inferred from circumstantial evidence, however, the circumstantial evidence must be "sufficient to permit a reasonable jury to conclude that a meeting of the minds had occurred and that the parties had an understanding to achieve the conspiracy's objectives." *Green v. Benden*, 281 F.3d 661, 665-66 (7th Cir. 2002). A plaintiff's mere conclusory allegations of a conspiracy are insufficient to support a claim under § 1983. *Wilson v. Budney*, 976 F.2d 957, 958 (5th Cir. 1992); *Lynch v. Cannatella*, 810 F.2d 1363 (5th Cir. 1987). Here, aside from his beliefs or speculation, Cuadra offers no evidence to support his claims that Defendants engaged in a conspiracy. Cuadra's claim also fails because he has

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F.Supp.1258, 1261 (E.D. Tex. 1992) (noting that, while a corporation cannot conspire with itself, a conspiracy may be established where individual defendants are named and those defendants act outside the scope of their employment for personal reasons)

not established an actual deprivation of his First, Fourth, or Fourteenth Amendment rights.

F. HISD Board's Liability Under § 1983

Defendant HISD moves for summary judgment on Cuadra's claim of governmental liability. (Doc. No. 80 at 53-61).[17] In particular, Defendant maintains that Cuadra's claims against it are time-barred; that his allegations cannot be attributed to an HISD policymaker; that there is no evidence of an "official policy"; and, even assuming an official policy existed, there is no evidence that it was the moving force behind the alleged violations of Cuadra's constitutional rights. *(Id.* at 61).

In *Monell v. Department of Soc. Servs. of New York*, the Supreme Court concluded that a municipality is a "person" within the meaning of § 1983. *Monell v. Dep't. of Social Servs.*, 436 U.S. 658, 689 (1978). The Court eliminated *respondeat superior* liability for governmental units when it held that a municipality may not be sued under § 1983 for an injury inflicted solely by its employees. *Id.* at 694. "Instead, it is when execution of a government's

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17. Insofar as Cuadra attempts to plead new claims in his Response *(e.g.,* HISD and/or Stripling and/or Patterson and/or Wichmann failed to implement appropriate training and supervision of Martin, Bonnette, Dombrino, Wichmann, Patterson and Aldrich not to engage in [un]ethical behavior and accurately report student data), that were not alleged in his Second Amended Complaint, Defendants' have objected to any such attempt. (Doc. No. 134 at 13). Defendants' objections are sustained. *See* n. 8, *supra.*

policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694.

Congress did not intend to impose liability on a municipality under § 1983 unless deliberate action attributable to the municipality itself is the "moving force" behind the plaintiff's deprivation of federal rights. *Board of the County Comm'rs of Bryan County v. Brown,* 520 U.S. 397, 400 (1997). The *Brown* Court further stated that a § 1983 plaintiff must "show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." *Id.* at 404. Thus, to prevail on a claim for school district liability under 42 U.S.C. § 1983 requires proof by the plaintiff of (1) a policymaker; (2) an official policy or custom; and (3) a violation of constitutional rights whose "moving force" is the policy or custom. *Piotrowski v. City of Houston,* 237 F.3d 567, 578 (5th Cir.2001) (citing *Monell v. Dept. of Social Services,* 436 U.S. 658, 694 (1978)).

Defendant initially argues that the Superintendents, SHS principal and other SHS employees that Cuadra identifies in his amended complaint[18] are not "policymakers" for purposes of imposing § 1983 liability. Defendants

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18. In his Second Amended Complaint, Cuadra identifies HISD Superintendents Stripling, DeWalt, Patterson, Saavedra and SHS principal Wichmann as the policymakers. (Doc. No. 34 at 5, ¶ D; 6, ¶ D).

are correct in their position. The identity of the final policymakers whose conduct can create liability is determined by state law. In *Rivera v. Houston Indep. School Dist.*, 349 F.3d 244 (5th Cir. 2003), the Fifth Circuit held that under Texas law, the Board of Trustees, not the Board in combination with any subordinate school district officials *(i.e.* teachers, principals, and superintendents), is the "official policymaker" for purposes of § 1983 liability. *Id.* at 247-48. Although principals and superintendents might have "decision-making authority" under the Texas Education Code, they do not have "the policymaking authority required to sustain liability under § 1983." *See id.* at 248. The Fifth Circuit stated that "the Board is the one and only policymaker for HISD," and the Board has not delegated any policymaking authority to subordinate school district personnel. *See id.* (" [T]his delegation of decision-making authority [to the principal] does not negate the fact that both under Texas law, and the Board's own policies, final policymaking authority lies exclusively with the Board."). *Id.*

Cuadra's claim for governmental liability under § 1983 fails because he has failed to show any violation that would be attributable to a "policymaker" for HISD. Cuadra cannot impute the actions of either the superintendents or the principal to the HISD Board for purposes of § 1983 liability. *Brittany B. v. Martinez*, 494 F.Supp.2d 534, 541 (W.D.Tex.2007). In addition, while Cuadra attempts to argue that a delegation of decision-making to Stripling or Saavedra regarding hiring, disciplinary, and/or termination decisions will suffice (Doc. No. 130 at 24-26), his argument finds no support in the law. *Rivera*, 349 F.

3d at 248; *see generally, City of St. Louis v. Praprotnik*, 485 U.S. 112, 125 (cautioning that "a federal court would not be justified in assuming that municipal policymaking authority lies somewhere other than where the applicable law purports to put it.").

Notwithstanding the lack of a Defendant with official policymaking authority, Cuadra cannot establish a basis for imposing liability on the school district for another reason. As asserted by HISD, Cuadra has presented no evidence of a policy, practice, or custom of deliberate indifference that was the moving force in a violation of his rights; nor does HISD have a policy of being deliberately indifferent to the rights of its employees. In order to prevail on his § 1983 claim against HISD, Cuadra must show that his constitutional rights were violated through the execution of an official policy or custom properly attributable to the school board itself. *Eugene v. Alief Indep. Sch. Dist.*, 65 F.3d 1299, 1304 (5th Cir.1995). It is not enough for Cuadra to merely identify conduct properly attributable to the district; he must also demonstrate that, through its deliberate conduct, the custom or policy of the district was the "moving force" behind the injuries alleged. *Doe v. Dallas Indep. Sch. Dist.*, 153 F.3d 211, 216 (5th Cir.1998); *Brown*, 520 U.S. at 403.

For purposes of the § 1983 claim against HISD, "official policy" is:

> 1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the [district's] lawmaking

> officers or by an official to whom the lawmakers have delegated policy-making authority; or
>
> 2. A persistent, widespread practice of [district] officials or employees which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents [district] policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the [district] or to an official to whom that body had delegated policy-making authority.

Webster v. City of Houston, 735 F.2d 838, 841 (5th Cir.1984). Of course, Cuadra has not presented evidence of a formal "policy statement" of maliciously prosecuting, falsely arresting or engaging in retaliatory criminal prosecution against employees who speak out about issues that was "officially adopted and promulgated" by the board. In fact, Cuadra has conceded that the HISD has policies that prohibit retaliation against an employee who exercises his constitutional rights. *(See* Doc. No. 34 at 48, ¶ a.(2).ii). Rather, relying on the second definition of "official policy," Cuadra essentially argues that the HISD Board established an informal custom of ignoring or condoning the actions of its Superintendents or principals when they are maliciously prosecuting, falsely arresting or engaging in retaliatory criminal prosecution against employees who speak out on issues such that it constituted official Board policy, and that this policy was the moving force behind the alleged violation of Cuadra's constitutional rights.

Cuadra's conclusory allegations are not sufficient to create a genuine issue of material fact to defeat Defendant's summary judgment motion. Further, no evidence shows that HISD's Board had actual or constructive knowledge of any such alleged custom or practice.

Finally, even assuming Cuadra could show the Board was not assiduous in preventing its supervisory employees from maliciously prosecuting, falsely arresting or engaging in retaliatory criminal prosecution against employees who speak out on issues, this does not demonstrate that the Board was deliberately indifferent towards the constitutional rights of Cuadra. The evidence not only reveals HISD's appropriate actions upon learning of the reporting issues, but the evidence also reveals that Defendants' actions prior to the media reports were appropriate and satisfied any duty owed to Cuadra. The evidence in this case is insufficient as a matter of law to establish that HISD maintained a policy, custom or practice of maliciously prosecuting, falsely arresting or engaging in retaliatory criminal prosecution against its employees or Cuadra.

G. Punitive Damages

Cuadra has asserted a claim for punitive damages against Defendant HISD, however, as a matter of law, punitive damages are not recoverable against a public school district such as HISD. *See, City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981); *Mosley v. Houston Community College*, 951 F.Supp. 1279, 1290 (S.D. Tex. 1996).

Appendix C

CONCLUSION

For all the reasons discussed herein, the Court **RECOMMENDS** that Defendants' Motion for Summary Judgment (Doc. No. 80) be **GRANTED**; that Plaintiff's Partial Motion for Summary Judgment (Doc. No. 87) be **DENIED**; and that Plaintiff's Second Amended Complaint be **DISMISSED**, with prejudice, in its entirety.

The Clerk **SHALL** send copies of this Report and Recommendation to the Parties. The Parties **SHALL** have until **September 1, 2009**, to have written objections, filed pursuant to 28 U.S.C. § 636(b)(1)(C), **physically on file** in the Office of the Clerk. *The Objections **SHALL** be electronically filed or mailed to the Clerk's Office at P.O. Box 61010, Houston, Texas 77208.* Any Objections filed **SHALL** be contained in a written document specifically entitled "Objections to the Report and Recommendation of the Magistrate Judge", which will then be forwarded to the District Judge for consideration. Failure to file written objections within the prescribed time **SHALL** bar the aggrieved party from attacking on appeal the factual findings and legal conclusions accepted by the District Judge, except upon grounds of plain error.

DONE at Galveston, Texas, this 17th day of August, 2009.

/s/
JOHN R. FROESCHNER
UNITED STATES MAGISTRATE JUDGE

APPENDIX D — ORDER DENYING PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED JANUARY 19, 2011

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Appeal from the United States District Court for the Southern District of Texas, Houston

No. 09-20715

KENNETH CUADRA,

Plaintiff-Appellant

v.

HOUSTON INDEPENDENT SCHOOL DISTRICT; CAROL WICHMANN; MARMION DAMBRINO; BILLY ALDRICH; BETH BONNETTE; MELBA MARTIN; ANNE PATTERSON,

Defendants-Appellees

ON PETITION FOR REHEARING EN BANC

(Opinion 11/17/10, 5 Cir., _____, _____, F.3d _____)

Before JONES, Chief Judge, and REAVLEY and HAYNES, Circuit Judges.

Appendix D

PER CURIAM:

> Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge